No. 83-1206

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

JOHN F. MEKIC,
Petitioner
v.
UNITED STATES OF AMERICA

**On A Petition For A Writ of Certiorari To
The United States Court of Appeals
For The Third Circuit**

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QUESTIONS PRESENTED

1. Does the enumeration of certain criminal powers in Article I, Section 8, and Article III, Section 3 of the United States Constitution deprive Congress of the power to create, define, and punish the misdemeanor crime of "willful failure to file a tax return", 26 USC §7203?

2. Is the misdemeanor crime of "willful failure to file a tax return", 26 USC §7203, unconstitutional?

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TABLE OF AUTHORITIES (cont.)

REFERENCE TO REPORTS OF OPINIONS BELOW

At this time, Petitioner is not aware of any official or unofficial reports concerning the opinions of the courts below. The judgment order for which review is sought is attached hereto as Appendix "A".

JURISDICTION STATEMENT

Petitioner seeks Certiorari review of the judgment order of the United States Court of Appeals for the Third Circuit entered in Case No. 82-5771, *United States of America v. John F. Mekic*, the 12th day of August, 1983.

The Petition for Rehearing En Banc was denied the 9th day of September, 1983, and on the 12th day of October, 1983, an order entered extending the Stay of Mandate to the 8th of November, 1983.

Petitioner invokes the jurisdiction of this Court under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article I, Section 8, clauses 6, 10, 17, and 18:

> The Congress shall have power to:
>
> (Clause 6) . . . provide for the punishment of counterfeiting the securities and current coin of the United States;
>
> (Clause 10) . . . define and punish piracies and felonies committed on the high seas, and offences against the law of nations;
>
> (Clause 17) . . . to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines,

arsenals, dock-yards and other needful buildings; and,

(Clause 18) . . . make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

United States Constitution, Article III, Section 3, clause 2:

(Clause 2) . . . The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

United States Constitution, Article V:

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal sufferage in the Senate.

United States Constitution, Amendment 10:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Constitution, Amendment 11:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.

The Internal Revenue Code of 1954, Section 7203, 26 USC §7203:

Willful failure to file return, supply information or pay tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of Section 6105), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

The Petitioner was charged by way of indictment with three (3) counts of violation of 26 USC §7203, "willful failure to file tax returns", for the years 1977, 1978, and 1979. The Petitioner was arraigned in the United States District Court for the Western District of Pennsylvania, the Honorable Alan N. Bloch, Jr., Judge presiding. Petitioner had entered for him a plea of not guilty, as the Petitioner challenged the Court's jurisdiction of the subject matter of the indictment. Petitioner was placed on a Personal Recognizance Bond at arraignment.

Pre-trial motions were heard on October 8, October 15, and October 19, 1982, and trial to the jury began October 19, 1982, concluding on October 21, 1982, with the jury's return of a verdict of guilty on all counts.

Sentencing was set for December 3, 1982, which date was later advanced to November 29, 1982, whereon, the Petitioner was sentenced to one (1) year of imprisonment on Count I, and one (1) year of imprisonment, suspended in favor of five (5) years probation on Counts II and III. Petitioner moved for and was granted a Stay of Execution pending completion of his appeal. A timely Notice of Appeal was filed.

On August 12, 1982, the United States Court of Appeals for the Third Circuit entered its Order of Judgment on the Petitioner's appeal, affirming the conviction and sentence below. Petitioner timely filed a Petition for Rehearing En Banc with the Court of

Appeals, which Petition was denied on September 9, 1983. A copy of the denial of the Petition for Rehearing is attached hereto as Appendix "B".

Petitioner moved for and was granted, a Stay of the Mandate pending filing of his Petition for a Writ of Certiorari to this Court. Petitioner sought and was granted, by and Order entered October 12, 1983, an extension of the Stay of Mandate to November 8, 1983.

Petitioner raised, as an issue of first impression on his appeal, the question for which he seeks Certiorari in this Court, i.e.: Does Congress have the power to create, define, and punish, as an offense against the laws of the United States, the misdemeanor crime of "willful failure to file a tax return", or is that offense unconstitutional as being beyond the power of Congress?

The Court of Appeals, in the decision sought to be reviewed, found the power to create, define, and punish the offense to be ". . . a necessary concomitant of its power to lay and collect taxes under Article I, Section 8 of the Constitution . . ."(See Appendix "A", page 2), and therefore, Constitutional.

Jurisdiction in the first instance was claimed under 18 USC §3231, placing original jurisdiction with the trial court over offenses against the laws of the United States.

REASONS FOR ALLOWING THE WRIT

I.

THE WRIT OF CERTIORARI SHOULD BE ALLOWED AS THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE DECIDED BY THE SUPREME COURT.

Petitioner submits that that Third Circuit Court of Appeals has erroneously decided an important question of Constitutional construction that has not been, but should be decided by this Court. Petitioner raised the issue of the Constitutionality of 26

USC §7203, "willful failure to file a tax return", as a question of first impression in his opening brief to the Court of Appeals, maintaining that the enumeration of certain criminal powers in Article I, Section 8, and Article III, Section 3 of the United States Constitution, deprives Congress of the power to create, define, and/or punish any crimes or offenses other than those specifically enumerated.

Petitioner submits that a proper construction of the powers enumerated in the sections and articles identified above, together with the Tenth and Eleventh Amendments, deprives Congress of the power it has exercised in enacting 26 USC §7203.

Petitioner submits it is evident from the notes of the Convention of 1787, that the framers did not intend the general government to have broad criminal powers. This view is supported by the *Federalist Papers*, letters 41 through 44, by Madison. Petitioner has attached hereto as Appendix "C", a copy of the sections of the notes on the convention concerning these powers, taken from Farrand, *The Records of the Federal Convention of 1787*, Yale University Press (1911), and a copy of Madison's letters, *Federalist Papers* 41 through 44, as Appendix "D".

This Court stated in *Marbury v. Madison*, 1 Cranch 137 (1803), that:

> Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all.
>
> It cannot be presumed that any clause in the Constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.
>
> *Ibid at 174.*

This canon of construction was not used by the Court below in making its decision on Petitioner's question. Rather, the Court relied on *United States v. Acker*, 415 F2d 328 (6th Cir., 1969), a case wholly inapposite to the question, for its decision that:

> 26 USC 7203 is constitutional, as Congress' power to enforce the tax laws is a necessary concomitant of its power

to lay and collect taxes under Article I, Section 8 of the Constitution.

Appendix "A", page 2.

This Court, in its decisions in *McCulloch v. Maryland*, 4 Wheat 316, and *National Railroad Corp. v. National Association of Railroad Passengers*, 414 US 453 (1974), has maintained that it is the intent of the legislature (the framers) that controls the law.

Petitioner submits that the intent is easily determined by reference to the appropriate authority, and shows that Congress does not have the power it has exercised.

There is further authority for the claim Petitioner advances. St. George Tucker, author of *Blackstone's Commentaries*, Birch & Small, Philadelphia (1803), reprinted Rothman & Kelley, New York/New Jersey (1969), states in the Appendix to Volume One of his work, that:

> Since each state in becoming a member of a federal republic retains an uncontrolled jurisdiction over all cases of *municipal* law, every grant of jurisdiction to the confederacy, in any such case, is to be considered as special, inasmuch as it derogates from the antecedent rights and jurisdiction of the state making the concession, and therefore ought to be construed strictly, upon the grounds already mentioned. Now, the cases falling under the head of *municipal law*, to which the authority of the federal government extends, are few, definite, and enumerated, and are all carved out of the sovereign authority, and former exclusive, and uncontrollable jurisdiction of the *states* respectively: they ought therefore to receive the strictest construction. Otherwise the gradual and sometimes imperceptible usurpations of power, will end in the total disregard of all its intended limitations.
>
> *Commentaries, Vol. I, Appdx. pages 152-153.*

Crimes and misdemeanors, if they affect not the existence of the federal government; or those objects to which its jurisdiction expressly extends, however heinous in a moral light,

are not cognizable by the federal courts; unless committed within certain fixed and determinate territorial limits, to which the exclusive legislative power granted to Congress, expressly extends. Their punishment, in all other cases, exclusively, belongs to the state jurisprudence.

Ibid at pages 186-187.

And here we may remark by the way, the very guarded manner in which Congress are vested with authority to legislate upon the subject of crimes, and misdemeanors. *They are not entrusted with a general power over these subjects, but a few offences are selected from the great mass of crimes with which society may be infested, upon which, only, Congress are authorised to prescribe the punishment, or define the offense. All felonies and offences committed upon land, in all cases not expressly enumerated, being reserved to the states respectively.* That all crimes cognizable by the federal courts (except such as are committed in places, the exclusive jurisdiction of which has been ceded to the federal government) must be previously defined (except treason), and the punishment thereof previously declared by the federal legislature. (emphasis supplied)

Ibid at page 269.

Additionally, Petitioner has attached hereto as Appendix "E", the Reports of the Virginia and Kentucky Legislatures concerning their *Resolutions Relative to the Alien and Sedition Laws*, the "Kentucky/Virginia Resolutions". Petitioner maintains that these documents, taken together with the Tenth and Eleventh Amendments to the Constitution, make it clear that the enumerated powers set forth at Article I, Section 8, clauses 6 and 10, and Article III, Section 3, clause 2, are the extent of Congress' criminal powers; that these are exclusive, and act as a negative to any power to criminalize sought for under Article I, Section 8, clause 18, the "necessary and proper" clause.

In 1793, this Court decided the case of *Chisholm v. Georgia*, 2 Dall 419, holding that a citizen of South Carolina could sue the State of Georgia under the Constitution. In response to that decision, the states formulated and ratified the Eleventh Amend-

ment, whereby they claimed the right to make mandatory interpretations of the Constitution. This amendment became part of the Constitution in 1798. That same year, the Congress enacted the Alien and Sedition Laws. These laws were the subjects of discussion by the legislatures of Kentucky and Virginia, and resulted in resolutions opposing them on Constitutional grounds.

Thomas Jefferson drafted the "Kennedy Resolutions" (See Appendix "E", pages 153-160), wherein at "2", it is:

> *RESOLVED*, that the Constitution of the United States having delegated to Congress a power to punish treason, counterfeiting the securities and current coin of the United States, piracies and felonies committed on the High Seas, and offences against the Laws of Nations, and no other crimes whatever, and it being true as a general principle, and one of the amendments to the Constitution having also declared 'That the powers not delegated to the United States by the Constitition, nor prohibited by it to the States, are reserved to the States respectively, or to the people'; therefore also the same act of Congress passed on the 14th day of July, 1798, and entitled 'An Act, in addition to the Act entitled an Act, for the punishment of certain crimes against the United States'; as also the Act passed by them on the 27th day of June, 1798, entitled "An Act, to punish frauds committed on the Bank of the United States', (and all other their acts which assume to create, define, or punish crimes other than those enumerated in the Constitution), are altogether void and of no force, and that the power to create, define, and punish such other crimes is reserved, and of right, appertains solely and exclusively to the respective States, each within its own territory.
>
> *Appendix "E", page 154.*

Madison, a member of the Convention of 1787, and a participant therein as well as a note-taker of the debates, speaks in the *Report* of the Virginia Resolution given to the legislature (Appendix "E", pages 98-153), on the judicial power and its relation to crimes:

> To this explanation of the text, the following observations may be added: The expression, 'cases in law and equity', is

> manifestly confined to cases of a civil nature; and would exclude cases of criminal jurisdiction. Criminal cases in law and equity would be a language unknown to the law . . .
>
> Once more; the amendment last added to the Constitution, deserves attention, as throwing light on this subject. 'The judicial power of the United States shall not be construed to extend to any suit in *law* or *equity*, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign power.' As it will not be pretended that any criminal proceeding could take place against a State; the terms *law* or *equity* must be understood as appropriate to *civil*, in exclusion of *criminal* cases.
>
> *Appendix "E", page 128.*

No Action has been taken under Article V of the Constitution to secure an amendment whereby the criminal power of Congress has been expanded beyond the powers originally granted. Petitioner contends that Congress is thus bound by those enumerated powers, and the Tenth and Eleventh Amendments to the Constitution, to confine its exercise to treason, counterfeiting the securities and current coin of the United States, piracies and felonies committed on the High Seas, offenses against the Law of Nations, and no other crimes whatever.

The power to create, define, and punish such other crimes, Petitioner maintains, is reserved to the States respectively, or to the people.

Petitioner submits that the foregoing citations of authority concerning canons of construction make it apparent that the enumeration of certain criminal powers in the Constitution deprives Congress of the authority to create, define or punish any crime other than those expressly enumerated, in Article I, Section 8, and Article III, Section 3 of the United States Constitution.

Petitioner contends that the misdemeanor crime for which he was convicted, that of "willful failure to file a tax return", is beyond the power of Congress to create, define, or punish, and is therefore unconstitutional.

Petitioner submits that as this Court has never decided a case construing these provisions of the Constitution, and their effect on the legislative, executive, and judicial powers of the United States Government, that Certiorari should be granted to examine this important question.

This Court's decision on the matter will have far-reaching effects on the exercise by Congress of its legislative power, on the executive in the exercise of its enforcement and administrative powers, and on the federal judiciary in the exercise of its jurisdiction as conferred by Congress. The decision will have far-reaching effects on the subject of "law and order", as it concerns the state legislatures and courts, and the liberties and properties of we, the people, under the United States Constitution.

Petitioner therefore contends, that this Petition should be granted, and the Writ of Certiorari allowed, to enable this Court to pass on the questions presented.

WHEREFORE, Petitioner respectfully requests this Honorable Court grant his Petition, and send its Writ of Certiorari to the United States Court of Appeals for the Third Circuit, for the case of *United States v. John F. Mekic*, 82-5771.

RESPECTFULLY SUBMITTED this 7th day of November, 1983.

JOHN F. MEKIC
Petitioner, Pro Se.
R.D. #7, Box 171
Latrobe, Pennsylvania 15650

United States

COURT OF APPEALS

For the Third Court

No. 82-5771

UNITED STATES OF AMERICA

vs.

MEKIC, JOHN F.,
Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania (Pittsburgh)
(D.C. Criminal No. 82-00113-01)
District Judge: Honorable Alan N. Bloch

Submitted
August 12, 1983
Before: ALDISERT and WEIS, *Circuit Judges*,
and RE, *Chief Judge*.*

JUDGMENT ORDER

John F. Mekic brings this *pro se* appeal to contest his conviction under 26 USC §7203 for willfully failing to file income tax returns in the years 1977-79. He contends that: (1) his prosecution under 26 USC §7203 is unconstitutional for want of due process, as Congress has no authority to create, define, and/or punish such an offense; (2) the district court erred in assuming jurisdic-

*Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

tion over his prosecution under 18 USC §3231; (3) his tax returns for 1977-79, on which he wrote "object: self-incrimination" in response to questions seeking financial information, constitute a valid exercise of the right against self-incrimination; (4) the district court erred in failing to charge the jury that a good faith though erroneous claim of a fifth amendment objection on a tax return is a defense to a 26 USC §7203 prosecution; (5) the district court erred in refusing to admit into evidence documents on which he relied; and (6) the district court erred in refusing his request that the jury be sworn to support the Constitution. Addressing these contentions *seriatim*, we find them meritless.

First, 26 USC §7203 is constitutional, as Congress' power to enforce the tax laws is a necessary concomitant of its power to lay and collect taxes under Article I, Section 8 of the Constitution. *United States v. Acker*, 415 F2d 328 (6th Cir. 1969). Second, the court below had proper jurisdiction because §7203, under which Mekic was indicted, renders the willful failure to file an income tax return, supply information to the I.R.S., or pay tax on "offense against the laws of the United States," subject to district court jurisdiction under 18 USC §3231. Third, Mekic has no valid defense to prosecution under the fifth amendment because he was unable to demonstrate a real basis for fearing that he would be subject to criminal prosecution if he were to answer the questions on the tax returns. *United States v. Edelson*, 604 F2d 232, 234 (3d Cir. 1979). Fourth, the district court adequately instructed the jury that a good faith belief by Mekic that he was filing a legitimate tax return could bar prosecution for the willful failure to file a return under 26 USC §7203. In fact, the district court modeled its instruction after one we sanctioned in *Edelson*. *Id.* at 235. Fifth, the district court did not abuse its discretion by refusing to admit into evidence documents that contained cases, statements of law, and appellant's thoughts as to why the law did not require him to file tax returns. The law should be given to the jury by the court and not introduced as evidence. *Cooley v. United States*, 501 F2d 1249, 1253 (9th Cir. 1974). Finally, no provision of the Constitution, statute, or court decision requires jurors to take an oath to support the Constitution.

Having rejected appellant's contentions, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT.

_____

Circuit Judge

Attest:

_____

Sally Mrvos, Clerk

DATED: August 12, 1983

United States

COURT OF APPEALS

For the Third Circuit

No. 82-5771

UNITED STATES OF AMERICA

vs.

MEKIC, JOHN F.,
Appellant

W.D. Pa. Crim. No. 82-00113-01

Present: SEITZ, *Chief Judge*, and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, and BECKER, *Circuit Judges*, and RE, *Chief Judge*.*

*Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT.

_____

Circuit Judge

DATED: September 9, 1983

APPENDIX "B"

The
FEDERALIST
Papers

ALEXANDER HAMILTON
JAMES MADISON
JOHN JAY

With an introduction, table of contents,
and index of ideas
by
CLINTON ROSSITER

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APPENDIX "C"

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curing its happiness, taken the cold and sullen resolution of disappointing its ardent hopes, of sacrificing substance to forms, of committing the dearest interests of their country to the uncertainties of delay and the hazard of events, let me ask the man who can raise his mind to one elevated conception, who can awaken in his bosom one patriotic emotion, what judgment ought to have been pronounced by the impartial world, by the friends of mankind, by every virtuous citizen, on the conduct and character of this assembly? Or if there be a man whose propensity to condemn is susceptible of no control, let me then ask what sentence he has in reserve for the twelve States who *usurped the power* of sending deputies to the convention, a body utterly unknown to their constitutions; for Congress, who recommended the appointment of this body, equally unknown to the Confederation; and for the State of New York, in particular, which first urged and then complied with this unauthorized interposition?

But that the objectors may be disarmed of every pretext, it shall be granted for a moment that the convention were neither authorized by their commission, nor justified by circumstances in proposing a Constitution for their country: does it follow that the Constitution ought, for that reason alone, to be rejected? If, according to the noble precept, it be lawful to accept good advice even from an enemy, shall we set the ignoble example of refusing such advice even when it is offered by our friends? The prudent inquiry, in all cases, ought surely to be not so much *from whom* the advice comes, as whether the advice be *good*.

The sum of what has been here advanced and proved is that the charge against the convention of exceeding their powers, except in one instance little urged by the objectors, has no foundation to support it; that if they had exceeded their powers, they were not only warranted, but required as the confidential servants of their country, by the circumstances in which they were placed to exercise the liberty which they assumed; and that finally, if they had violated both their powers and their obligations in proposing a Constitution, this ought nevertheless to be embraced, if it be calculated to accomplish the views and happiness of the people of America. How far this character is due to the Constitution is the subject under investigation. PUBLIUS

No. 41: Madison

The Constitution proposed by the convention may be considered under two general points of view. The FIRST relates to the sum or quantity of power which it vests in the government, including the restraints imposed on the States. The SECOND, to the particular structure of the government and the distribution of this power among its several branches.

Under the first view of the subject, two important questions arise: 1. Whether any part of the powers transferred to the general government be unnecessary or improper? 2. Whether the entire mass of them be dangerous to the portion of jurisdiction left in the several States?

Is the aggregate power of the general government greater than ought to have been vested in it? This is the first question.

It cannot have escaped those who have attended with candor to the arguments employed against the extensive powers of the government that the authors of them have very little considered how far these powers were necessary means of attaining a necessary end. They have chosen rather to dwell on the inconveniences which must be unavoidably blended with all political advantages; and on the possible abuses which must be incident to every power or trust of which a beneficial use can be made. This method of handling the subject cannot impose on the good sense of the people of America. It may display the subtlety of the writer; it may open a boundless field for rhetoric and declamation; it may inflame the passions of the unthinking and may confirm the prejudices of the misthinking: but cool and candid people will at once reflect that the purest of human blessings must have a portion of alloy in them; that the choice must always be made, if not of the lesser evil, at least of the GREATER, not the PERFECT, good; and that in every political institution, a power of advance the public happiness involves a discretion which may be misapplied and abused. They will see, therefore, that in all cases where power is to be conferred, the point first to be decided is whether such a power be necessary to the public good; as the next will be, in case of an affirmative decision, to guard as effectually as possible against a perversion of the power to the public detriment.

That we may form a correct judgment on this subject, it will be proper to review the several powers conferred on the government of the Union; and that this may be the more conveniently done

they may be reduced into different classes as they relate to the following different objects: 1. Security against foreign danger; 2. Regulation of the intercourse with foreign nations; 3. Maintenance of harmony and proper intercourse among the States; 4. Certain miscellaneous objects of general utility; 5. Restraint of the States from certain injurious acts; 6. Provisions for giving due efficacy to all these powers.

The powers falling within the first class are those of declaring war and granting letters of marque; of providing armies and fleets; of regulating and calling forth the militia; of levying and borrowing money.

Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The powers requisite for attaining it must be effectually confided to the federal councils.

Is the power of declaring war necessary? No man will answer this question in the negative. It would be superfluous, therefore, to enter into a proof of the affirmative. The existing Confederation establishes this power in the most ample form.

Is the power of raising armies and equipping fleets necessary? This is involved in the foregoing power. It is involved in the power of self-defense.

But was it necessary to give an INDEFINITE POWER of raising TROOPS, as well as providing fleets; and of maintaining both in PEACE as well as in WAR?

The answer to these questions has been too far anticipated in another place to admit an extensive discussion of them in this place. The answer indeed seems to be so obvious and conclusive as scarcely to justify such a discussion in any place. With what color of propriety could the force necessary for defense be limited by those who cannot limit the force of offense? If a federal Constitution could chain the ambition or set bounds to the exertions of all other nations, then indeed might it prudently chain the discretion of its own government and set bounds to the exertions for its own safety.

How could a readiness for war in time of peace be safely prohibited, unless we could prohibit in like manner the preparations and establishments of every hostile nation? The means of security can only be regulated by the means and the danger of attack. They will, in fact, be ever determined by these rules and

by no others. It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions. If one nation maintains constantly a disciplined army, ready for the service of ambition or revenge, it obliges the most pacific nations who may be within the reach of its enterprises to take corresponding precautions. The fifteenth century was the unhappy epoch of military establishments in time of peace. They were introduced by Charles VII of France. All Europe has followed, or been forced into, the example. Had the example not been followed by other nations, all Europe must long ago have worn the chains of a universal monarch. Were every nation except France now to disband its peace establishment, the same event might follow. The veteran legions of Rome were an over-match for the undisciplined valor of all other nations, and rendered her mistress of the world.

Not the less true is it that the liberties of Rome proved the final victim of her military triumphs; and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price for her military establishments. A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution. A wise nation will combine all these considerations; and, whilst it does not rashly preclude itself from any resource which may become essential to its safety, will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties.

The clearest marks of this prudence are stamped on the proposed Constitution. The Union itself, which it cements and secures, destroys every pretext for a military establishment which could be dangerous. America united, with a handful of troops, or without a single soldier, exhibits a more forbidding posture to foreign ambition than America disunited, with a hundred thousand veterans ready for combat. It was remarked on a former occasion that the want of this pretext had saved the liberties of one nation in Europe. Being rendered by her insular situation and her maritime resources impregnable to the armies of her

neighbors, the rulers of Great Britain have never been able, by real or artificial dangers, to cheat the public into an extensive peace establishment. The distance of the United States from the powerful nations of the world gives them the same happy security. A dangerous establishment can never be necessary or plausible, so long as they continue a united people. But let it never for a moment be forgotten that they are indebted for this advantage to their Union alone. The moment of its dissolution will be the date of a new order of things. The fears of the weaker, or the ambition of the stronger States, or Confederacies, will set the same example in the new as Charles VII did in the old world. The example will be followed here from the same motives which produced universal imitation there. Instead of deriving from our situation the precious advantage which Great Britain has derived from hers, the face of America will be but a copy of that of the continent of Europe. It will present liberty everywhere crushed between standing armies and perpetual taxes. The fortunes of disunited America will be even more disastrous than those of Europe. The sources of evil in the latter are confined to her own limits. No superior powers of another quarter of the globe intrigue among her rival nations, inflame their mutual animosities, jealousy, and revenge. In America the miseries springing from her internal jealousies, contentions, and wars would form a part only of her lot. A plentiful addition of evils would have their source in that relation in which Europe stands to this quarter of the earth, and which no other quarter of the earth bears to Europe.

This picture of the consequences of disunion cannot be too highly colored, or too often exhibited. Every man who loves peace, every man who loves his country, every man who loves liberty ought to have it ever before his eyes that he may cherish in his heart a due attachment to the Union of America and be able to set a due value on the means of preserving it.

Next to the effectual esablishment of the Union, the best possible precaution against danger from standing armies is a limitation of the term for which revenue may be appropriate to their support. This precaution the Constitution has prudently added. I will not repeat here the observations which I flatter myself have placed this subject in a just and satisfactory light. But it may not be improper to take notice of an argument against this

part of the Constitution, which has been drawn from the policy and practice of Great Britain. It is said that the continuance of an army in that kingdom requires an annual vote of the legislature; whereas the American Constitution has lengthened this critical period to two years. This is the form in which the comparison is usually stated to the public: but is it a just form? Is it a fair comparison? Does the British Constitution restrain the parliamentary discretion to one year? Does the American impose on the Congress appropriations for two years? On the contrary, it cannot be unknown to the authors of the fallacy themselves that the British Constitution fixes no limit whatever to the discretion of the legislature, and that the American ties down the legislature to two years as the longest admissible term.

Had the argument from the British example been truly stated, it would have stood thus: The term for which supplies may be appropriated to the army establishment, though unlimited by the British Constitution, has nevertheless, in practice, been limited by parliamentary discretion to a single year. Now, if in Great Britain, where the House of Commons is elected for seven years; where so great a proportion of the members are elected by so small a proportion of the people; where the electors are so corrupted by the representatives, and the representatives so corrupted by the Crown, the representative body can possess a power to make appropriations to the army for an indefinite term, without desiring, or without daring, to extend the term beyond a single year, ought not suspicion herself to blush, in pretending that the representatives of the United States, elected FREELY by the WHOLE BODY of the people every SECOND YEAR, cannot be safely intrusted with the discretion over such appropriations, expressly limited to the short period of TWO YEARS?

A bad cause seldom fails to betray itself. Of this truth the management of the opposition of the federal government is an unvaried exemplification. But among all the blunders which have been committed, none is more striking than the attempt to enlist on that side the prudent jealousy entertained by the people of standing armies. The attempt has awakened fully the public attention to that important subject; and has led to investigations which must terminate in a thorough and universal conviction, not only that the Constitution has provided the most effectual guards against danger from that quarter, but that nothing short

of a Constitution fully adequate to the national defense and the preservation of the Union can save America from as many standing armies as it may be split into States or Confederacies, and from such a progressive augmentation of these establishments in each as will render them as burdensome to the properties and ominous to the liberties of the people as any establishment that can become necessary under a united and efficient government must be tolerable to the former and safe to the latter.

The palpable necessity of the power to provide and maintain a navy has protected that part of the Constitution against a spirit of censure which has spared few other parts. It must, indeed, be numbered among the greatest blessings of America that as her Union will be the only source of her maritime strength, so this will be a principal source of her security against danger from abroad. In this respect our situation bears another likeness to the insular advantage of Great Britain. The batteries most capable of repelling foreign enterprises on our safety are happily such as can never be turned by a perfidious government against our liberties.

The inhabitants of the Atlantic frontier are all of them deeply interested in this provision for naval protection, and if they have hitherto been suffered to sleep quietly in their beds; if their property has remained safe against the predatory spirit of licentious adventurers; if their maritime towns have not yet been compelled to ransom themselves from the terrors of a conflagration by yielding to the exactions of daring and sudden invaders, these instances of good fortune are not to be ascribed to the capacity of the existing government for the protection of those from whom it claims allegiance, but to causes that are fugitive and fallacious. If we except perhaps Virginia and Maryland, which are peculiarly vulnerable on their eastern frontiers, no part of the Union ought to feel more anxiety on this subject than New York. Her seacoast is extensive. A very important district of the State is an island. The State itself is penetrated by a large navigable river for more than fifty leagues. The great emporium of its commerce, the great reservoir of its wealth, lies every moment at the mercy of events, and may also be regarded as a hostage for ignominious compliances with the dictates of a foreign enemy, or even with the rapacious demands of pirates and barbarians. Should a war be the result of the precarious situation of European affairs, and all

the unruly passions attending it be let loose on the ocean, our escape from insults and depredations, not only on that element, but every part of the other bordering on it, will be truly miraculous. In the present condition of America, the States more immediately exposed to these calamities have nothing to hope from the phantom of a general government which now exists; and if their single resources were equal to the task of fortifying themselves against the danger, the object to be protected would be almost consumed by the means of protecting them.

The power of regulating and calling forth the militia has been already sufficiently vindicated and explained.

The power of levying and borrowing money, being the sinew of that which is to be exerted in the national defense, is properly thrown into the same class with it. This power, also, has been examined already with such attention, and has, I trust, been clearly shown to be necessary, both in the extent and form given to it by the Constitution. I will address one additional reflection only to those who contend that the power ought to have been restrained to external taxation — by which they mean taxes on articles imported from other countries. It cannot be doubted that this will always be a valuable source of revenue; that for a considerable time it must be a principal source; that at this moment it is an essential one. But we may form very mistaken ideas on this subject, if we do not call to mind in our calculations that the extent of revenue drawn from foreign commerce must vary with the variations, both in the extent and the kind of imports; and that these variations do not correspond with the progress of population, which must be the general measure of the public wants. As long as agriculture continues the sole field of labor, the importation of manufactures must increase as the consumers multiply. As soon as domestic manufactures are begun by the hands not called for by agriculture, the imported manufactures will decrease as the numbers of people increase. In a more remote stage, the imports may consist in a considerable part of raw materials, which will be wrought into articles for exportation, and will, therefore, require rather the encouragement of bounties than to be loaded with discouraging duties. A system of government meant for duration ought to contemplate these revolutions and be able to accommodate itself to them.

Some who have not denied the necessity of the power of taxation have grounded a very fierce attack against the Constitution, on the language in which it is defined. It has been urged and echoed that the power "to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States," amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction.

Had no other enumeration or definition of the powers of the Congress been found in the Constitution than the general expressions just cited, the authors of the objection might have had some color for it; though it would have been difficult to find a reason for so awkward a form of describing an authority to legislate in all possible cases. A power to destroy the freedom of the press, the trial by jury, or even to regulate the course of descents, or the forms of conveyances, must be very singularly expressed by the terms " to raise money for the general welfare."

But what color can the objection have, when a specification of the objects alluded to by these general terms immediately follows and is not even separated by a longer pause than a semicolon? If the different parts of the same instrument ought to be so expounded as to give meaning to every part which will bear it, shall one part of the same sentence be excluded altogether from a share in the meaning; and shall the more doubtful and indefinite terms be retained in their full extent, and the clear and precise expressions be denied any signification whatsoever? For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity, which, as we are reduced to the dilemma of charging either on the authors of the objection or on the authors of the Constitution, we must take the liberty of supposing had not its origin with the latter.

The objection here is the more extraordinary, as it appears that the language used by the convention is a copy from the Articles of Confederation. The objects of the Union among the States, as described in article third, are "their common defense, security of their liberties, and mutual and general welfare." The terms of article eighth are still more identical: "All charges of war and all other expenses that shall be incurred for the common defense or general welfare and allowed by the United States in Congress shall be defrayed out of a common treasury," etc. A similar language again occurs in article ninth. Construe either of these articles by the rules which would justify the construction put on the new Constitution, and they vest in the existing Congress a power to legislate in all cases whatsoever. But what would have been thought of that assembly, if, attaching themselves to these general expressions and disregarding the specifications which ascertain and limit their import, they had exercised an unlimited power of providing for the common defense and general welfare? I appeal to the objectors themselves, whether they would in that case have employed the same reasoning in justification of Congress as they now make use of against the convention. How difficult it is for error to escape its own condemnation.

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The *second* class of powers lodged in the general government consist of those which regulate the intercourse with foreign nations, to wit: to make treaties; to send and receive ambassadors, other public ministers, and consuls; to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; to regulate foreign commerce, including a power to prohibit, after the year 1808, the importation of slaves, and to lay an intermediate duty of ten dollars per head, as a discouragement to such importations.

This class of powers forms an obvious and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations.

The powers to make treaties and to send and receive ambassadors speak their own propriety. Both of them are comprised in the Articles of Confederation, with this difference only, that the former is disembarrassed by the plan of the convention, of an

exception under which treaties might be substantially frustrated by regulations of the States; and that a power of appointing and receiving "other public ministers and consuls" is expressly and very properly added to the former provision concerning ambassadors. The term ambassador, if taken strictly, as seems to be required by the second of the Articles of Confederation, comprehends the highest grade only of public ministers, and excludes the grades which the United States will be most likely to prefer, where foreign embassies may be necessary. And under no latitude of construction will the term comprehend consuls. Yet it has been found expedient, and has been the practice of Congress, to employ the inferior grades of public ministers and to send and receive consuls.

It is true that where treaties of commerce stipulate for the mutual appointment of consuls, whose functions are connected with commerce, the admission of foreign consuls may fall within the power of making commercial treaties; and that where no such treaties exist, the mission of American consuls into foreign countries may *perhaps* be covered under the authority, given by the ninth article of the Confederation, to appoint all such civil officers as may be necessary for managing the general affairs of the United States. But the admission of consuls into the United States, where no previous treaty has stipulated it, seems to have been nowhere provided for. A supply of the omission is one of the lesser instances in which the convention have improved on the model before them. But the most minute provisions become important when they tend to obviate the necessity or the pretext for gradual and unobserved usurpations of power. A list of the cases in which Congress have been betrayed, or forced by the defects of the Confederation, into violations of their chartered authorities would not a little surprise those who have paid no attention to the subject; and would be no inconsiderable argument in favor of the new Constitution, which seems to have provided no less studiously for the lesser than the more obvious and striking defects of the old.

The power to define and punish piracies and felonies committed on the high seas and offenses against the law of nations belongs with equal propriety to the general government, and is a still greater improvement on the Articles of Confederation. These articles contain no provision for the case of offenses

against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations. The provision of the federal articles on the subject of piracies and felonies extends no further than to the establishment of courts for the trial of these offenses. The definition of piracies might, perhaps, without inconveniency, be left to the law of nations; though a legislative definition of them is found in most municipal codes. A definition of felonies on the high seas is evidently requisite. Felony is a term of loose signification even in the common law of England; and of various import in the statute law of that kingdom. But neither the common nor the statute law of that, or of any other nation, ought to be a standard for the proceedings of this, unless previously made its own by legislative adoption. The meaning of the term, as defined in the codes of the several States, would be as impracticable as the former would be a dishonorable and illegitimate guide. It is not precisely the same in any two of the States; and varies in each with every revision of its criminal laws. For the sake of certainty and uniformity, therefore, the power of defining felonies in this case was in every respect necessary and proper.

The regulation of foreign commerce, having fallen within several views which have been taken of this subject, has been too fully discussed to need additional proofs here of its being properly submitted to the federal administration.

It were doubtless to be wished that the power of prohibiting the importation of slaves had not been postponed until the year 1808, or rather that it had been suffered to have immediate operation. But it is not difficult to account either for this restriction on the general government, or for the manner in which the whole clause is expressed. It ought to be considered as a great point gained in favor of humanity that a period of twenty years may terminate forever, within these States, a traffic which has so long and so loudly upbraided the barbarism of modern policy; that within that period it will receive a considerable discouragement from the federal government, and may be totally abolished, by a concurrence of the few States which continue the unnatural traffic in the prohibitory example which has been given by so great a majority of the Union. Happy would it be for the unfortunate Africans if an equal prospect lay before them of being redeemed from the oppressions of their European brethren!

Attempts have been made to pervert this clause into an objection against the Constitution by representing it on one side as a criminal toleration of an illicit practice, and on another as calculated to prevent voluntary and beneficial emigration from Europe to America. I mention these misconstructions not with a view to give them an answer, for they deserve none, but as specimens of the manner and spirit in which some have thought fit to conduct their opposition to the proposed government.

The powers included in the *third* class are those which provide for the harmony and proper intercourse among the States.

Under this head might be included the particular restraints imposed on the authority of the States and certain powers of the judicial department; for the former are reserved for a distinct class and the latter will be particularly examined when we arrive at the structure and organization of the government. I shall confine myself to a cursory review of the remaining powers comprehended under this third description, to wit: to regulate commerce among the several States and the Indian tribes; to coin money, regulate the value thereof and of foreign coin; to provide for the punishment of counterfeiting the current coin and securities of the United States; to fix the standard of weights and measures; to establish a uniform rule of naturalization, and uniform laws of bankruptcy; to prescribe the manner in which the public acts, records, and judicial proceedings of each State shall be proved, and the effect they shall have in other States; and to establish post offices and post roads.

The defect of power in the existing Confederacy to regulate the commerce between its several members is in the number of those which have been clearly pointed out by experience. To the proofs and remarks which former papers have brought into view on this subject, it may be added that without this supplemental provision, the great and essential power of regulating foreign commerce would have been incomplete and ineffectual. A very material object of this power was the relief of the States which import and export through other States from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of

the former. We may be assured by past experience that such a practice would be introduced by future contrivances; and both by that and a common knowledge of human affairs that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquillity. To those who do not view the question through the medium of passion or of interest, the desire of the commercial States to collect, in any form, an indirect revenue from their uncommercial neighbors must appear not less impolitic than it is unfair; since it would stimulate the injured party by resentment as well as interest to resort to less convenient channels for their foreign trade. But the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned, before public bodies as well as individuals, by the clamors of an impatient avidity for immediate and immoderate gain.

The necessity of a superintending authority over the reciprocal trade of confederated States has been illustrated by other examples as well as our own. In Switzerland, where the Union is so very slight, each canton is obliged to allow to merchandises a passage through its jurisdiction into other cantons, without an augmentation of the tolls. In Germany it is a law of the empire that the princes and states shall not lay tolls or customs on bridges, rivers, or passages, without the consent of the emperor and the diet; though it appears from a quotation in an antecedent paper that the practice in this, as in many other instances in that confederacy, has not followed the law, and has produced there the mischiefs which have been foreseen here. Among the restraints imposed by the Union of the Netherlands on its members, one is that they shall not establish imposts disadvantageous to their neighbors without the general permission.

The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the Articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not

members of a State, yet residing within its legislative jurisdiction can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the Articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom by taking away a part and letting the whole remain.

All that need be remarked on the power to coin money, regulate the value thereof, and of foreign coin, is that by providing for this last case, the Constitution has supplied a material omission in the Articles of Confederation. The authority of the existing Congress is restrained to the regulation of coin *struck* by their own authority, or that of the respective States. It must be seen at once that the proposed uniformity in the *value* of the current coin might be destroyed by subjecting that of foreign coin to the different regulations of the different States.

The punishment of counterfeiting the public securities, as well as the current coin, is submitted of course to that authority which is to secure the value of both.

The regulation of weights and measures is transferred from the Articles of Confederation, and is founded on like considerations with the preceding power of regulating coin.

The dissimilarity in the rules of naturalization has long been remarked as a fault in our system, and as laying a foundation for intricate and delicate questions. In the fourth article of the Confederation, it is declared "that the *free inhabitants* of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of *free citizens* in the several States; and *the people* of each State shall, in every other, enjoy all the privileges of trade and commerce," etc. There is a confusion of language here which is remarkable. Why the terms *free inhabitants* are used in one part of the article, *free citizens* in another, and *people* in another; or what was meant by superadding to "all privileges and immunities of free citizens," "all the privileges of trade and commerce," cannot easily be determined. It seems to be a construction scarcely avoidable, however, that those who come under the denomination of *free inhabitants* of a State, although not citizens of such State, are

entitled, in every other State, to all the privileges of *free citizens* of the latter; that is, to greater privileges than they may be entitled to in their own State: so that it may be in the power of a particular State, or rather every State is laid under a necessity not only to confer the rights of citizenship in other States upon any whom it may admit to such rights within itself, but upon any whom it may allow to become inhabitants within its jurisdiction. But were an exposition of the term "inhabitants" to be admitted which would confine the stipulated privileges to citizens alone, the difficulty is diminished only, not removed. The very improper power would still be retained by each State of naturalizing aliens in every other State. In one State, residence for a short term confirms all the rights of citizenship: in another, qualifications of greater importance are required. An alien, therefore, legally incapacitated for certain rights in the latter, may, by previous residence only in the former, elude his incapacity; and thus the law of one State be preposterously rendered paramount to the law of another, within the jurisdiction of the other. We owe it to mere casualty that very serious embarrassments on this subject have been hitherto escaped. By the laws of several States, certain descriptions of aliens, who had rendered themselves obnoxious, were laid under interdicts inconsistent not only with the rights of citizenship but with the privilege of residence. What would have been the consequence if such persons, by residence or otherwise, had acquired the character of citizens under the laws of another State, and then asserted their rights as such, both to residence and citizenship, within the State proscribing them? Whatever the legal consequences might have been, other consequences would probably have resulted of too serious a nature not to be provided against. The new Constitution has accordingly, with great propriety, made provision against them, and all others proceeding from the defect of the Confederation on this head, by authorizing the general government to establish a uniform rule of naturalization throughout the United States.

The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.

The power of prescribing by general laws the manner in which the public acts, records, and judicial proceedings of each State shall be proved, and the effect they shall have in other States, is an evident and valuable improvement on the clause relating to this subject in the Articles of Confederation. The meaning of the latter is extremely indeterminate, and can be of little importance under any interpretation which it will bear. The power here established may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous States, where the effects liable to justice may be suddenly and secretly translated in any stage of the process within a foreign jurisdiction.

The power of establishing post roads must, in every view, be a harmless power and may, perhaps, by judicious management become productive of great public conveniency. Nothing which tends to facilitate the intercourse between the States can be deemed unworthy of the public care. PUBLIUS

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The *fourth* class comprises the following miscellaneous powers:

1. A power "to promote the progress of science and useful arts by securing, for a limited time, to authors and inventors the exclusive right to their respective writings and discoveries."

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point by laws passed at the instance of Congress.

2. "To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the government of the United States; and to exercise like authority over all places purchased by the consent of the legislatures of the States in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

The indispensable necessity of complete authority at the seat of government carries its own evidence with it. It is a power exercised by every legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it not only the public authority might be insulted and its proceeding interrupted with impunity, but a dependence of the members of the general government on the State comprehending the seat of the government for protection in the exercise of their duty might bring on the national councils an imputation of awe or influence equally dishonorable to the government and dissatisfactory to the other members of the Confederacy. This consideration has the more weight as the gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the government, as still further to abridge its necessary independence. The extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature. And as it is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the government which is to exercise authority over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession will be derived from the whole people of the State in their adoption of the Constitution, every imaginable objection seems to be obviated.

The necessity of a like authority over forts, magazines, etc., established by the general government, is not less evident. The public money expended on such places, and the public property deposited in them, require that they should be exempt from the authority of the particular State. Nor would it be proper for the places on which the security of the entire Union may depend to be in any degree dependent on a particular member of it. All objections and scruples are here also obviated by requiring the concurrence of the States concerned in every such establishment.

3. "To declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."

As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it. But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author.

4. "To admit new States into the Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of the Congress."

In the Articles of Confederation, no provision is found on this important subject. Canada was to be admitted of right, on her joining in the measures of the United States; and the other *colonies*, by which were evidently meant the other British colonies, at the discretion of nine States. The eventual establishment of *new States* seems to have been overlooked by the compilers of that instrument. We have seen the inconvenience of this omission, and the assumption of power into which Congress have been led by it. With great propriety, therefore, has the new system supplied the defect. The general precaution that no new States shall be formed without the concurrence of the federal authority and that of the States concerned is consonant to the principles which ought to govern such transactions. The particular precaution against the erection of new States, by the partition of a State without its consent, quiets the jealousy of the larger States; as that of the smaller is quieted by a like precaution against a junction of States without their consent.

5. "To dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with a proviso that nothing in the Constitution shall be so

construed as to prejudice any claims of the United States, or of any particular State."

This is a power of very great importance, and required by considerations similar to those which show the propriety of the former. The proviso annexed is proper in itself, and was probably rendered absolutely necessary by jealousies and questions concerning the Western territory sufficiently known to the public.

6. "To guarantee to every State in the Union a republican form of government; to protect each of them against invasion; and on application of the legislature, or of the exclusive (when the legislature cannot be convened), against domestic violence."

In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be *substantially* maintained. But a right implies a remedy; and where else could the remedy be deposited than where it is deposited by the Constitution? Governments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort than those of a kindred nature. "As the confederate republic of Germany," says Montesquieu, "consists of free cities and petty states, subject to different princes, experience shows us that it is more imperfect than that of Holland and Switzerland." "Greece was undone," he adds, "as soon as the king of Macedon obtained a seat among the Amphictyons." In the latter case, no doubt, the disproportionate force, as well as the monarchical form of the new confederate, had its share of influence on the events. It may possibly be asked what need there could be of such a precaution, and whether it may not become a pretext for alterations in the State governments, without the concurrence of the States themselves. These questions admit of ready answers. If the interposition of the general government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers? To

the second question it may be answered that if the general government should interpose by virtue of this constitutional authority, it will be, of course, bound to pursue the authority. But the authority extends no further than to a *guaranty* of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so and to claim the federal guaranty for the latter. The only restriction imposed on them is that they shall not exchange republican for anti-republican Constitutions; a restriction which, it is presumed, will hardly be considered as a grievance.

A protection against invasion is due from every society to the parts composing it. The latitude of the expression here used seems to secure each State not only against foreign hostility, but against ambitious or vindictive enterprises of its more powerful neighbors. The history both of ancient and modern confederacies proves that the weaker members of the Union ought not to be insensible to the policy of this article.

Protection against domestic violence is added with equal propriety. It has been remarked that even among the Swiss cantons, which, properly speaking, are not under one government, provision is made for this object; and the history of that league informs us that mutual aid is frequently claimed and afforded; and as well by the most democratic as the other cantons. A recent and well-known event among ourselves has warned us to be prepared for emergencies of a like nature.

At first view, it might seem not to square with the republican theory to suppose either that a majority have not the right, or that a minority will have the force, to subvert a government; and consequently that the federal interposition can never be required but when it would be improper. But theoretic reasoning, in this as in most other cases, must be qualified by the lessons of practice. Why may not illicit combinations, for purposes of violence, be formed as well by a majority of a State, especially a small State, as by a majority of a county, or a district of the same State; and if the authority of the State ought, in the latter case, to protect the local magistracy, ought not the federal authority, in the former, to support the State authority? Besides, there are certain parts of

the State constitutions that a violent blow cannot be given to the one without communicating the wound to the other. Insurrections in a State will rarely induce a federal interposition, unless the number concerned in them bear some proportion to the friends of government. It will be much better that the violence in such cases should be repressed by the superintending power, than that the majority should be left to maintain their cause by a bloody and obstinate contest. The existence of a right to interpose will generally prevent the necessity of exerting it.

Is it true that force and right are necessarily on the same side in republican governments? May not the minor party possess such a superiority of pecuniary resources, of military talents and experience, or of secret succors from foreign powers, as will render it superior also in an appeal to the sword? May not a more compact and advantageous position turn the scale on the same side against a superior number so situated as to be less capable of a prompt and collected exertion of its strength? Nothing can be more chimerical than to imagine that in a trial of actual force victory may be calculated by the rules which prevail in a census of the inhabitants, or which determine the event of an election! May it not happen, in fine, that the minority of *citizens* may become a majority of *persons*, by the accession of alien residents, of a casual concourse of adventurers, or of those whom the constitution of the State has not admitted to the rights of suffrage? I take no notice of an unhappy species of population abounding in some of the States, who, during the calm of regular government, are sunk below the level of men; but who, in the tempestuous scenes of civil violence, may emerge into the human character and give a superiority of strength to any party with which they may associate themselves.

In cases where it may be doubtful on which side justice lies, what better umpires could be desired by two violent factions, flying to arms and tearing a State to pieces, than the representatives of confederate States, not heated by the local flame? To the impartiality of judges, they would unite the affection of friends. Happy would it be if such a remedy for its infirmities could be enjoyed by all free governments; if a project equally effectual could be established for the universal peace of mankind!

Should it be asked what is to be the redress for an insurrection pervading all the States, and comprising a superiority of the entire force, though not a constitutional right? The answer must be that such a case, as it would be without the compass of human remedies, so it is fortunately not within the compass of human probability; and that it is a sufficient recommendation of the federal Constitution that it diminishes the risk of a calamity for which no possible constitution can provide a cure.

Among the advantages of a confederate republic enumerated by Montesquieu, an important one is "that should a popular insurrection happen in one of the States, the others are able to quell it. Should abuses creep into one part, they are reformed by those that remain sound."

7. "To consider all debts contracted and engagements entered into before the adoption of this Constitution as being no less valid against the United States under this Constitution than under the Confederation."

This can only be considered as a declaratory proposition; and may have been inserted, among other reasons, for the satisfaction of the foreign creditors of the United States, who cannot be strangers to the pretended doctrine that a change in the political form of civil society has the magical effect of dissolving its moral obligations.

Among the lesser criticisms which have been exercised by the Constitution, it has been remarked that the validity of engagements ought to have been asserted in favor of the United States, as well as against them; and in the spirit which usually characterizes little critics, the omission has been transformed and magnified into a plot against the national rights. The authors of this discovery may be told what few others need to be informed of, that as engagements are in their nature reciprocal, an assertion of their validity on one side necessarily involves a validity on the other side; and that as the article is merely declaratory, the establishment of the principle in one case is sufficient for every case. They may be further told that every constitution must limit its precautions to dangers that are not altogether imaginary; and that no real danger can exist that the government would *dare*, with or even without this constitutional declaration before it, to remit the debts justly due to the public on the pretext here condemned.

8. "To provide for amendments to be ratified by three fourths of the States under two exceptions only."

That useful alterations will be suggested by experience could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults. It, moreover, equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other. The exception in favor of the equality of suffrage in the Senate was probably meant as a palladium of the residuary sovereignty of the States, implied and secured by that principle of representation in one branch of the legislature; and was probably insisted on by the States particularly attached to that equality. The other exception must have been admitted on the same considerations which produced the privilege defended by it.

9. "The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States, ratifying the same."

This article speaks for itself. The express authority of the people alone could give due validity to the Constitution. To have required the unanimous ratification of the thirteen States would have subjected the essential interests of the whole to the caprice or corruption of a single member. It would have marked a want of foresight in the convention, which our own experience would have rendered inexcusable.

Two questions of a very delicate nature present themselves on this occasion: 1. On what principle the Confederation, which stands in the solemn form of a compact among the States, can be superseded without the unanimous consent of the parties to it? 2. What relation is to subsist between the nine or more States ratifying the Constitution, and the remaining few who do not become parties to it?

The first question is answered at once by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are

the objects at which all political institutions aim and to which all such institutions must be sacrificed. *Perhaps*, also, an answer may be found without searching beyond the principles of the compact itself. It has been heretofore noted among the defects of the Confederation that in many of the States it had received no higher sanction than a mere legislative ratification. The principle of reciprocality seems to require that its obligation on the other States should be reduced to the same standard. A compact between independent sovereigns, founded on ordinary acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties. It is an established doctrine on the subject of treaties that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach, committed by either of the parties, absolves the others, and authorizes them, if they please, to pronounce the compact violated and void. Should it unhappily be necessary to appeal to these delicate truths for a justification for dispensing with the consent of particular States to a dissolution of the federal pact, will not the complaining parties find it a difficult task to answer the *multiplied* and *important* infractions with which they may be confronted? The time has been when it was incumbent on us all to veil the ideas which this paragraph exhibits. The scene is now changed, and with it the part which the same motives dictate.

The second question is not less delicate; and the flattering prospect of its being merely hypothetical forbids an over-curious discussion of it. It is one of those cases which must be left to provide for itself. In general, it may be observed that although no political relation can subsist between the assenting and dissenting States, yet the moral relations will remain uncanceled. The claims of justice, both on one side and on the other, will be in force, and must be fulfilled; the rights of humanity must in all cases be duly and mutually respected; whilst considerations of a common interest, and, above all, the remembrance of the endearing scenes which are past, and the anticipation of a speedy triumph over the obstacles to reunion, will, it is hoped, not urge in vain *moderation* on one side, and *prudence* on the other. PUBLIUS

No. 44: MADISON

A *fifth* class of provisions in favor of the federal authority con-

sists of the following restrictions on the authority of the several States.

1. "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver a legal tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility."

The prohibition against treaties, alliances, and confederations makes a part of the existing articles of Union; and for reasons which need no explanation, is copied into the new Constitution. The prohibition of letters of marque is another part of the old system, but is somewhat extended in the new. According to the former, letters of marque could be granted by the States after a declaration of war; according to the latter, these licenses must be obtained, as well during war as previous to its declaration, from the government of the United States. This alteration is fully justified by the advantage of uniformity in all points which relate to foreign powers; and of immediate responsibility to the nation in all those for whose conduct the nation itself is to be responsible.

The right of coining money, which is here taken from the States, was left in their hands by the Confederation as a concurrent right with that of Congress, under an exception in favor of the exclusive right of Congress to regulate the alloy and value. In this instance, also, the new provision is an improvement on the old. Whilst the alloy and value depended on the general authority, a right of coinage in the particular States could have no other effect than to multiply expensive mints and diversify the forms and weights of the circulating pieces. The latter inconveniency defeats one purpose for which the power was originally submitted to the federal head; and as far as the former might prevent an inconvenient remittance of gold and silver to the central mint for recoinage, the end can be as well attained by local mints established under the general authority.

The extension of the prohibition to bills of credit must give pleasure to every citizen in proportion to his love of justice and his knowledge of the true springs of public prosperity. The loss which America has sustained since the peace, from the pestilent effects of paper money on the necessary confidence between man and man, on the necessary confidence in the public councils, on

the industry and morals of the people, and on the character of republican government, constitutes an enormous debt against the States chargeable with this unadvised measure, which must long remain unsatisfied; or rather an accumulation of guilt, which can be expiated no otherwise than by a voluntary sacrifice on the altar of justice of the power which has been the instrument of it. In addition to these persuasive considerations, it may be observed that the same reasons which show the necessity of denying to the States the power of regulating coin prove with equal force that they ought not to be at liberty to substitute a paper medium in the place of coin. Had every State a right to regulate the value of its coin, there might be as many different currencies as States, and thus the intercourse among them would be impeded; retrospective alterations in its value might be made, and thus the citizens of other States be injured, and animosities be kindled among the States themselves. The subjects of foreign powers might suffer from the same cause, and hence the Union be discredited and embroiled by the indiscretion of a single member. No one of these mischiefs is less incident to a power in the States to emit paper money than to coin gold or silver. The power to make anything but gold and silver a tender in payment of debts is withdrawn from the States on the same principle with that of issuing a paper currency.

Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares

to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society. The prohibition with respect to titles of nobility is copied from the Articles of Confederation and needs no comment.

2. "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. No State shall, without the consent of Congress, lay any duty on tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war unless actually invaded, or in such imminent danger as will not admit of delay."

The restraint on the power of the States over imports and exports is enforced by all the arguments which prove the necessity of submitting the regulation of trade to the federal councils. It is needless, therefore, to remark further on this head, than that the manner in which the restraint is qualified seems well calculated at once to secure to the States a reasonable discretion in providing for the conveniency of their imports and exports, and to the United States a reasonable check against the abuse of this discretion. The remaining particulars of this clause fall within reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark.

The *sixth* and last class consists of the several powers and provisions by which efficacy is given to all the rest.

1. Of these the first is the "power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or office thereof."

Few parts of the Constitution have been assailed with more intemperance than this; yet on a fair investigation of it, as has been elsewhere shown, no part can appear more completely invulnerable. Without the *substance* of this power, the whole Constitution would be a dead letter. Those who object to the article, therefore, as a part of the Constitution, can only mean that the *form* of the provision is improper. But have they considered whether a better form could have been substituted?

There are four other possible methods which the Convention might have taken on this subject. They might have copied the second article of the existing Confederation, which would have prohibited the exercise of any power not *expressly* delegated; they might have attempted a positive enumeration of the powers comprehended under the general terms "necessary and proper"; they might have attempted a negative enumeration of them by specifying the powers excepted from the general definition; they might have been altogether silent on the subject, leaving these necessary and proper powers to construction and inference.

Had the convention taken the first method of adopting the second article of Confederation, it is evident that the new Congress would be continually exposed, as their predecessors have been, to the alternative of construing the term "*expressly*" with so much rigor as to disarm the government of all real authority whatever, or with so much latitude as to destroy altogether the force of the restriction. It would be easy to show, if it were necessary, that no important power delegated by the Articles of Confederation has been or can be executed by Congress, without recurring more or less to the doctrine of *construction* or *implication*. As the powers delegated under the new system are more extensive, the government which is to administer it would find itself still more distressed with the alternative of betraying the public interests by doing nothing, or of violating the Constitution by exercising powers indispensably necessary and proper, but, at the same time, not *expressly* granted.

Had the convention attempted a positive enumeration of the powers necessary and proper for carrying their other powers into effect, the attempt would have involved a complete digest of laws on every subject to which the Constitution relates; accommodated too not only to the existing state of things, but to all the possible changes which futurity may produce; for in every new

application of a general power, the *particular powers*, which are the means of attaining the *object* of the general power, must always necessarily vary with that object, and be often properly varied whilst the object remains the same.

Had they attempted to enumerate the particular powers or means not necessary or proper for carrying the general powers into execution, the task would have been no less chimerical; and would have been liable to this further objection, that every defect in the enumeration would have been equivalent to a positive grant of authority. If, to avoid this consequence, they had attempted a partial enumeration of the exceptions, and described the residue by the general terms *not necessary or proper*, it must have happened that the enumeration would comprehend a few of the excepted powers only; that these would be such as would be least likely to be assumed or tolerated, because the enumeration would of course select such as would be least necessary or proper; and that the unnecessary and improper powers included in the residuum would be less forcibly excepted than if no partial enumeration had been made.

Had the Constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government by unavoidable implication. No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included. Had this last method, therefore, been pursued by the convention, every objection now urged against their plan would remain in all its plausibility; and the real inconveniency would be incurred of not removing a pretext which may be seized on critical occasions for drawing into question the essential powers of the Union.

If it be asked what is to be the consequence, in case the Congress shall misconstrue this part of the Constitution and exercise powers not warranted by its true meaning, I answer the same as if they should misconstrue or enlarge any other power vested in them; as if the general power had been reduced to particulars, and any one of these were to be violated; the same, in short, as if the State legislatures should violate their respective constitutional authorities. In the first instance, the success of the usurpa-

tion will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; and in the last resort a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers. The truth is that this ultimate redress may be more confided in against unconstitutional acts of the federal than of the State legislatures, for this plain reason that as every such act of the former will be an invasion of the rights of the latter, these will be ever ready to mark the innovation, to sound the alarm to the people, and to exert their local influence in effecting a change of federal representatives. There being no such intermediate body between the State legislatures and the people interested in watching the conduct of the former, violations of the State constitutions are more likely to remain unnoticed and unredressed.

2. "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

The indiscreet zeal of the adversaries to the Constitution has betrayed them into an attack on this part of it also, without which it would have been evidently and radically defective. To be fully sensible of this, we need only suppose for a moment that the supremacy of the State constitutions had been left complete by a saving clause in their favor.

In the first place, as these constitutions invest the State legislatures with absolute sovereignty in all cases not excepted by the existing Articles of Confederation, all the authorities contained in the proposed Constitution, so far as they exceed those enumerated in the Confederation, would have been annulled, and the new Congress would have been reduced to the same impotent condition with their predecessors.

In the next place, as the constitutions of some of the States do not even expressly and fully recognize the existing powers of the Confederacy, an express saving of the supremacy of the former would, in such States, have brought into question every power contained in the proposed Constitution.

In the third place, as the constitutions of the States differ much from each other, it might happen that a treaty or national law of great and equal importance to the States would interfere with some and not with other constitutions, and would consequently be valid in some of the States at the same time that it would have no effect in others.

In fine, the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members.

3. "The senators and representatives, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and the several States, shall be bound by oath or affirmation to support this Constitution."

It has been asked why it was thought necessary that the State magistracy should be bound to support the federal Constitution, and unnecessary that a like oath should be imposed on the officers of the United States in favor of the State constitutions.

Several reasons might be assigned for the distinction. I content myself with one, which is obvious and conclusive. The members of the federal government will have no agency in carrying the State constitutions into effect. The members and officers of the State governments, on the contrary, will have an essential agency in giving effect to the federal Constitution. The election of the President and Senate will depend, in all cases, on the legislatures of the several States. And the election of the House of Representatives will equally depend on the same authority in the first instance; and will, probably, forever be conducted by the officers and according to the laws of the States.

4. Among the provisions for giving efficacy to the federal powers might be added those which belong to the executive and judiciary departments: but as these are reserved for particular examination in another place, I pass them over in this.

We have now reviewed, in detail, all the articles composing the sum or quantity of power delegated by the proposed Constitution to the federal government, and are brought to this undeniable conclusion that no part of the power is unnecessary or improper for accomplishing the necessary objects of the

Union. The question, therefore, whether this amount of power shall be granted or not resolves itself into another question, whether or not a government commensurate to the exigencies of the Union shall be established; or, in other words, whether the Union itself shall be preserved. PUBLIUS

No. 45: MADISON

HAVING shown that no one of the powers transferred to the federal government is unnecessary or improper, the next question to be considered is whether the whole mass of them will be dangerous to the portion of authority left in the several States.

The adversaries to the plan of the convention, instead of considering in the first place what degree of power was absolutely necessary for the purposes of the federal government, have exhausted themselves in a secondary inquiry into the possible consequences of the proposed degree of power to the governments of the particular States. But if the Union, as has been shown, be essential to the security of the people of America against foreign danger; if it be essential to their security against contentions and wars among the different States; if it be essential to guard them against those violent and oppressive factions which embitter the blessings of liberty and against those military establishments which must gradually poison its very fountain; if, in a word, the Union be essential to the happiness of the people of America, is it not preposterous to urge as an objection to a government, without which the objects of the Union cannot be attained, that such a government may derogate from the importance of the governments of the individual States? Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the governments of the individual States, that particular municipal establishments, might enjoy a certain extent of power and be arrayed with certain dignities and attributes of sovereignty? We have heard of the impious doctrine of the old world, that the people were made for kings, not kings for the people. Is the same doctrine to be revived in the new, in another shape — that the solid happiness of the people is to be sacrificed to the views of political institutions of a different form? It is too early

for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object. Were the plan of the convention adverse to the public happiness, my voice would be, Reject the plan. Were the Union itself inconsistent with the public happiness, it would be, Abolish the Union. In like manner, as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter. How far the sacrifice is necessary has been shown. How far the unsacrificed residue will be endangered is the question before us.

Several important considerations have been touched in the course of these papers, which discountenance the supposition that the operation of the federal government will by degrees prove fatal to the State governments. The more I revolve the subject, the more fully I am persuaded that the balance is much more likely to be disturbed by the preponderancy of the last than of the first scale.

We have seen, in all the examples of ancient and modern confederacies, the strongest tendency continually betraying itself in the members to despoil the general government of its authorities, with a very ineffectual capacity in the latter to defend itself against

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APPENDIX "D"

COMMITTEE OF DETAIL, III

15. S. & H. D. in C. ass. shall institute Offices and appoint Officers for the Departments of for. Affairs, War, Treasury and Admiralty —

They shall have the exclusive Power of declaring what shall be Treason & Misp. of Treason agt. U. S. — and of instituting a federal judicial Court, to which an Appeal shall be allowed from the judicial Courts of the several States in all Causes wherein Questions shall arise on the Construction of Treaties made by U.S. — or on the Law of Nations — or on the Regulations of U. S. concerning Trade & Revenue — or wherein U. S. shall be a Party — The Court shall consist of Judges to be appointed during good Behaviour — S. & H. D. in C. ass shall have the exclusive Right of instituting in each State a Court of Admiralty, and appointing the Judges &c of the same for all maritime Causes which may arise therein respectively.

16. S. & H. D. in C. ass. shall have the exclusive Right of coining Money — regulating its Alloy & Value — fixing the Standard of Weights and Measures throughout U. S.

17. Points in which the Assent of more than a bare Majority shall be necessary.

18. Impeachments shall be by the H. D. before the Senate and the judges of the federeal judicial Court.

19. S. & H. D. in C. ass. shall regulate the Militia thro' the U.S.

20. Means of enforcing and compelling the Payment of the Quota of each State.

21. Manner and Conditions of admiting new States.

22. Power of dividing annexing and consolidating States, on the Consent and Petition of such States.

23. The assent of the Legislature of States shall be sufficient to invest future additional Powers in U. S. in C. ass. and shall bind the whole Confederacy.

24. The Articles of Confederation shall be inviolably observed,* and the Union shall be perpetual: *unless altered as before directed[5]

[5]The crosses are evidently intended to indicate that the last two clauses should be reversed.

COMMITTEE OF DETAIL, IV

taxation proportioned to representation 2. No (headpost) capitation-tax which does not apply to all inhabitants under the above limitation (& to be levied uniform) 3. no (other) *indirect* tax which is not common to all. 4. (Delinquencies shall be be distress — [illegible words]) 5. To regulate commerce {both foreign & domestic}

2. {no State to lay a duty on imports —}

Exceptions

1. no Duty on exports.

2. no prohibition on (such) {ye} Importations of {such} inhabitants {or People as the sevl. States think proper to admit}

3. no duties by way of such prohibition.

Restrictions

1. A navigation act shall not be passed, but with the consent of (eleven states in) {⅔d. of the Members present of} the senate and (10 in) {the like No. of} the house of representatives.

(2. Nor shall any other regulation — and this rule shall prevail, whensoever the subject shall occur in any act.)

(3. the lawful territory To make treaties of commerce (qu: as to senate) Under the foregoing restrictions)

4. (To make treaties of peace or alliance (qu: as to senate) under the foregoing restrictions, and without the surrender of territory for an equivalent,

and in no case, unless a superior title.)

5. To make war{: (and)} raise armies. {& equip Fleets.}

6. To provide tribunals and punishment for mere offences against the law of nations.

{Indian Affairs}[11]

7. To declare the law of piracy, felonies and captures on the high seas, and captures on land.

{to regulate Weights & Measures}[11]

[11]Marginal note.

COMMITTEE OF DETAIL, IV

8. To appoint tribunals, inferior to the supreme judiciary.
9. To adjust upon the plan heretofore used *all* disputes between the States {respecting Territory & Jurisdn}
10. To (regulate) {The exclusive right of} coining {money (Paper prohibit) no State to be perd. in future to emit Paper Bills of Credit witht. the App: of the Natl. Legisle nor to make any (Article) Thing but Specie a Tender in paymt of debts}[11*]
11. To regulate naturalization
12. (To draw forth the) {make Laws for calling forth the Aid of the} militia, (or any part, or to authorize the Executive to embody them) {to execute the Laws of the Union to repel Invasion to inforce Treaties suppress internal Comns.}
13. To establish post-offices
14. To subdue a rebellion in any particular state, on the application of the legislature thereof.

{of declaring the Crime & Punishment of Counterfeiting it}[11*]

15. To enact articles of war.
16. To regulate the force permitted to be kept in each state.
17. To send embassadors)

{Power to borrow Money —
To appoint a Treasurer by (joint) ballot.}[11*]

18. To declare it to be treason to levy war against or adhere to the enemies of the U.S.
19. (To organize the government in those things, which)

{Insert the 11 Article}

(All laws of a particular state, repugnant hereto, shall be void, and in the decision thereon, which shall be vested in the supreme judiciary, all incidents without which the general principles cannot be satisfied shall be considered, as involved in the general principle.)

{That Trials for Criml. Offences be in the State where the Offe was comd — by Jury — and a right to make all Laws necessary to carry the foregoing Powers into Execu —}

2. The powers belonging peculiarly to the representatives are those concerning money-bills
3. The powers destined for the senate peculiarly, are

Each House shall possess the Right of Originating Bills, except in the Cases beforementioned.

7.

Every Bill, which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the (Governour) {President} of the United States for his Revision: If, upon such Revision, he approve of it; he shall signify his Approbation by signing it: But if, upon such Revision, it shall appear to him improper for being passed into a Law; he shall return it, together with his Objections against it, to that House, in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider the Bill. But if after such Reconsideration, two thirds of that House shall, notwithstanding the Objections of the (Governour) {President}, agree to pass it, it shall, together with his Objections, be sent to the Other House, by which it shall likewise to reconsidered, and, if approved by two thirds of the other House also; it shall be a Law. But in all such Cases, the Votes of both Houses shall be determined by Yeas and Nays; and the Names of the Persons voting for or against the Bill shall be entered in the Journal of each House respectively.

If any bill shall not be returned by the (Governour) {President} within {seven} days after it shall have been presented to him, it shall be a Law, unless the Legislature by their Adjournment prevent its Return; in which Case it shall (be returned on the first Day of the next Meeting of the Legislature) {not}.

8.

The Legislature of the United States shall have the (Right and) Power to lay and collect Taxes, Duties, Imposts and Excises; to regulate (Naturalization and) Commerce {with foreign Nations & amongst the several States}; *to establish an uniform Rule for Naturalization throughout the United States;* to coin Money; to regulate the (Alloy and) Value of {foreign} Coin; to fix the Standard of Weights and Measures; to establish Post-offices; to borrow Money, and emit Bills on the Credit of the United States; to appoint a Treasurer by Ballott; to constitute Tribunals inferior

to the Supreme (national) Court; to make Rules concerning Captures on Land or Water; to declare the Law and Punishment of Piracies and Felonies committed on the high Seas, and the Punishment of counterfeiting the {Coin} (and) {of the U. S. &} of Offences against the Law of Nations; (to declare what shall be Treason against the United States;) {& of Treason agst the U: S: or any of them; not to work Corruption of Blood or Forfeit except during the Life of the Party;} to regulate the Discipline of the Militia of the several States; to subdue a Rebellion in any State, on the Application of its Legislature; to make War; to raise Armies; to build and equip Fleets, to (make laws for) call(ing) forth the Aid of the Militia, in order to execute the Laws of the Union, (to) enforce Treaties, (to) suppress Insurrections, and repel invasions; and to make all Laws that shall be necessary and proper for carrying into (full and complete) Execution (the foregoing Powers, and) all other powers vested, by this Constitution, in the Government of the United States, or in any Department or Officer thereof;

(Representation shall)

(Direct Taxation shall always be in Proportion to Representation in the House of Representatives.)

The proportions of direct Taxation shall be regulated by the whole Number of white and other free Citizens and Inhabitants, of every Age, Sex and Condition, including those bound to Servitude for a Term of Years, and three fifths of all other Persons not comprehended in the foregoing Description; which Number shall, within six Years after the first Meeting of the Legislature, and within the Term of every ten Years afterwards, be taken in such Manner as the said Legislature shall direct.

From the first Meeting of the Legislature until the Number of Citizens and Inhabitants shall be taken as aforesaid, direct Taxation shall be in Proportion to the Number of Representatives chosen in each State.

No Tax or Duty shall be laid by the Legislature, on Articles

Sect. 12. Each House shall possess the right of originating bills, except in the cases beforementioned.

Sect. 13. Every bill, which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States for his revision: if, upon such revision, he approve of it, he shall signify his approbation by signing it: But if, upon such revision, it shall appear to him improper for being passed into a law, he shall return it, together with his objections against it, to that House in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider the bill. But if after such reconsideration, two thirds of that House shall, notwithstanding the objections of the President, agree to pass it, it shall together with his objections, be sent to the other House, by which it shall likewise be reconsidered, and [,] if approved by two thirds of the other House also, it shall become a law. But in all such cases, the votes of both Houses shall be determined by yeas and nays; and the names of the persons voting for or against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within seven days after it shall have been presented to him, it shall be a law, unless the legislature by their adjournment, prevent its return; in which case it shall not be a law.

VII [VI][5]

Sect. 1. The Legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises;

To regulate commerce with foreign nations, and among the several States;

[5]In the printed copy, the number VI was repeated, consequently Article VII and all subsequent articles were misnumbered. It is important to remember this in noting subsequent references to articles by number.

FRIDAY, AUGUST 17, 1787.

JOURNAL

Friday August 17. 1787.

It was moved and seconded to insert the word "joint" before the word "ballot" in the 9 clause of the 1 sect. 7 article

which passed in the affirmative [Ayes — 7; noes — 3.]

It was moved and seconded to strike out the 9 clause of the 1. sect. of the 7 article

which passed in the negative [Ayes — 4; noes — 6.]

[To strike out the words "and punishment 11 [12] clause 1 sect 7 art Ayes — 7; noes — 3.][1]

It was moved and seconded to alter the first part of the 12th clause 1 sect. 7 article to read as follows

"To punish piracies and felonies committed on the high seas"

which passed in the affirmative [Ayes — 7; noes — 3.]

It was moved and seconded to insert the words "define and" between the word "To" and the word "punish" in the 12 clause

which passed in the affirmative

It was moved and seconded to amend the second part of the 12 clause as follows

"To punish the counterfeiting of the securities and current coin of the United States, and offences against the law of nations"

which passed in the affirmative

["or without, when the Legislature cannot. Ayes — 5; noes —3; divided — 2.][2]

[1]Vote 308. Detail of Ayes and Noes.

[2]Vote 310. Detail of Ayes and Noes.

DETAIL OF AYES AND NOES

	New Hampshire	Massachusetts	Rhode Island	Connecticut	New York	New Jersey	Pennsylvania	Delaware	Maryland	Virginia	No Carolina	So Carolina	Georgia	Questions	ayes	nays	divided
[306]	aye	aye		no		no	aye		no	aye	aye	aye	aye	To appoint a Treasurer by joint ballot	7	3	
[307]	no	no		no			aye	aye	aye	no	no	aye	no	To strike out the 9 clause of ye 1 sect 7 article	4	6	
[308]	no	aye		no			aye	aye	no	aye	aye	aye	aye	To strike out the words "and punishment of clause 1 sect 7 art	7	3	
[309]	aye	aye		no			aye	aye	aye	no	no	aye	aye	To punish piracies & felonies committed on the high seas.	7	3	
[310]	aye	no		aye			dd	no	no	aye	dd	aye	aye	"or without, when the Legislature cannot.	5	3	2
[311]	aye	no		aye				no	no	aye	no	no	aye	To agree to the 13 clause as amended			
[312]	aye			no					no	no	dd	aye	no	"To subdue rebellion"			
[313]	no			no			aye	aye	no	aye	aye	no	no	To strike out "make" to insert "declare"	4	5	
[314]	no			aye			aye	aye	aye	aye	aye	aye	aye	The last question repeated	8	1	
[315]	no	no		no			no	no	no	no	no	no	no	To add "to make peace" to ye 12 clause			

MADISON

Friday August 17th. in Convention

Art VII. sect. 1. resumed. On the clause "to appoint Treasurer by ballot".

Mr Ghorum moved to insert "joint" before ballot, as more convenient as well as reasonable, than to require the separate concurrence of the Senate.

Mr. Pinkney 2ds. the motion. Mr Sherman opposed it as favoring the larger States.

Mr. Read moved to strike out the clause, leaving the appointment of the Treasurer as of other officers to the Executive. The Legislature was an improper body for appointments. Those of the State legislatures were a proof of it— The Executive being responsible would make a good choice.

Mr Mercer 2ds. the motion of Mr Read.

On the motion for inserting the word "joint" before ballot

N. H- ay. Mas. ay. Ct. no. N. J. no. Pa. ay. Md. no. Va. ay- N- C. ay. S. C. ay. Geo- ay- [Ayes — 7; noes — 3.]

Col. Mason in opposition to Mr. Reads motion desired it might be considered to whom the money would belong: if to the people, the legislature representing the people ought to appoint the keepers of it.

On striking out the clause as amended by inserting "Joint"

N. H. no- Mas. no. Ct. no. Pa. ay- Del- ay. Md. ay. Va no. N. C. no. S- C- ay. Geo. no- [Ayes — 4; noes — 6.]

"To constitute inferior tribunals" agreed to nem. con.

"To make rules as to captures on land & water"— do do

"To declare the law and punishment of piracies and felonies &c" &c considered.

Mr. {Madison} moved to strike out "and punishment" &c-

Mr. Mason doubts the safety of it, considering the strict rule of construction in criminal cases. He doubted also the propriety of taking the power in all these cases wholly from the States.

Mr Governr Morris thought it would be necessary to extend the authority farther, so as to provide for the punishment of counterfeiting in general. Bills of exchange for example might be forged in one State and carried into another:

It was suggested by some other member that *foreign* paper might be counterfeited by Citizens; and that it might be politic to provide by national authority for the punishment of it.

Mr Randolph did not conceive that expunging "the punishment" would be a constructive exclusion of the power. He doubted only the efficacy of the word "declare".

Mr Wilson was in favor of the motion- Strictness was not necessary in giving authority to enact penal laws; though necessary in enacting & expounding them.

On motion for striking out "and punishment" as moved by Mr {Madison}

N. H. no Mas. ay. Ct no. Pa ay. Del. ay- Md no. Va. ay. N- C- ay. S- C. ay- Geo. ay. [Ayes — 7; noes — 3.]

Mr Govr Morris moved to strike out "declare the law" and insert "punish" before "piracies". and on the question

N- H- ay. Mas- ay. Ct. no. Pa. ay. Del. ay. Md ay. Va. no. N. C- no. S. C- ay. Geo- ay. [Ayes — 7; noes — 3.]

Mr. M{adison.} and Mr. Randolph moved to insert, "define &." before "punish".

Mr. Wilson thought "felonies" sufficiently defined by Common law.

Mr. Dickenson concurred with Mr Wilson

Mr Mercer was in favor of the amendment.

Mr M{adison.} felony at common law is vague.[4] It is also defective. One defect is supplied by Stat: of Anne as to running away with vessels which at common law was a breach of trust only. Besides no foreign law should be a standard farther than is expressly adopted — If the laws of the States were to prevail on this subject, the citizens of different States would be subject to different punishments for the same offence at sea — There would be neither uniformity nor stability in the law — The proper remedy for all these difficulties was to vest the power proposed by the term "define" in the Natl. legislature.

Mr Govr. Morris would prefer *designate* to *define*, the latter being as he conceived, limited to the preexisting meaning. ——— It was said by others to be applicable to the creating of offences also, and therefore suited the case both of felonies & of piracies. {The motion of Mr. M. & Mr. R was agreed to.}[5]

Mr. Elseworth enlarged the motion so as to read "to define and punish piracies and felonies committed on the high seas, counterfeiting the securities and current coin of the U. States, and offences agst. the law of Nations" which was agreed to, nem con.

"To subdue a rebellion in any State, on the application of its legislature"

[4]See Appendix A. CCXV. [5]Taken from *Journal.*

McHENRY

August 17.

Agreed "to appoint a treasurer by joint Ballot; To constitute tribunals inferior to the supreme court; To make rules concerning captures on land and water;

expunged the next section and inserted

To define and punish piracies and felonies committed on the high seas;

To punish counterfeiting the securities and the current coin of the United States.

Struck out the clause To subdue a rebellion etc.

Debated the difference between a power to declare war, and to make war — amended by substituting declare — adjourned without a question on the clause.

Conform to such opinions or not as he may think proper; and every officer abovementioned shall be responsible for his opinion on the affairs relating to his particular Department.

Each of the officers abovementioned shall be liable to impeachment & removal from office for neglect of duty malversation, or corruption"}[4]

Mr Gerry moved "that the Committee be instructed to report proper qualifications for the President, and a mode of trying {the Supreme} Judges {in cases of} impeachment.[5]

The clause "to call forth the aid of the Militia &c- was postponed till report should be made as to the power over the Militia referred yesterday to the Grand Committee {of eleven}.

Mr. Mason moved to enable Congress "to enact sumptuary laws." No Government can be maintained unless the manners be made consonant to it. Such a discretionary power may do good and can do no harm. A proper regulation of excises & of trade may do a great deal but it is best to have an express provision. It was objected to sumptuary laws that they were contrary to nature. This was a vulgar error. The love of distinction it is true is natural; but the object of sumptuary laws is not to extinguish this principle but to give it a proper direction.

Mr. Elseworth. The best remedy is to enforce taxes & debts. As far as the regulation of eating & drinking can be reasonable, it is provided for in the power of taxation.

Mr Govr. Morris argued that sumptuary laws tended to create a landed Nobility, by fixing in the great-landholders and their posterity their present possessions.

Mr Gerry. the law of necessity is the best sumptuary law.

On Motion of Mr. Mason "as to sumptuary laws"

N. H. no. Mas- no. Ct no. N. J. no. Pa. no. Del. ay. Md. ay. Va. no. N- C. no- S. C. no. Geo. ay. [Ayes — 3; noes — 8.]

"And to make all laws necessary and proper for carrying into execution the foregoing powers, and all other powers vested, by this Constitution, in the Government of the U. S. or any department or officer thereof."[6]

[4] See above, note 4. [5] Revised from *Journal*. [6] See Appendix A, CLXI.

Mr. M{adison} and Mr. Pinkney moved to insert between "laws" and "necessary" "and establish all offices". it appearing to them liable to cavil that the latter was not included in the former.

Mr. Govr. Morris. Mr. Wilson, Mr Rutlidge and Mr. Elseworth urged that the amendment could not be necessary.

On the motion for inserting "and establish all offices"

N. H. no. Mas. ay. Ct. no. N. J. no. Pa. no. Del. No. Md. ay. Va. no. N- C- no. S. C. no. Geo. no. [Ayes — 2; noes — 9.]

The clause as reported was then agreed to nem con.

Art: VII sect. 2. concerning Treason which see[7]

Mr. M{adison,} thought the definition too narrow. It did not appear to go as far as the Stat. of Edwd. III. He did not see why more latitude might not be left to the Legislature. It wd. be as safe as in the hands of State legislatures; and it was inconvenient to bar a discretion which experience might enlighten, and which might be applied to good purposes as well as be abused.

Mr Mason was for pursuing the Stat: of Edwd. III.

Mr. Govr Morris was for giving to the Union an exclusive right to declare what shd. be treason. In case of a contest between the U- S- and a particular State, the people of the latter must, under the disjunctive terms of the clause, be traitors to {one} or other authority.

Mr Randolph thought the clause defective in adopting the words "in adhering" only. The British Stat: adds. "giving them aid {and}[8] comfort" which had a more extensive meaning.

Mr. Elseworth considered the definition as the same in fact with that of the Statute.

[7]Article VII, Sect. 2. "Treason against the United States shall consist only in levying war against the United States, or any of them; and in adhering to the enemies of the United States, or any of them. The Legislature of the United States shall have power to declare the punishment of treason. No person shall be convicted of treason, unless on the testimony of two witnesses. No attainder of treason shall work corruption of bloods nor forfeiture, except during the life of the person attainted."

[8]Crossed out "or".

Mr. Govr Morris "adhering" does not go so far as giving aid {and}[a] Comfort" or the latter words may be restrictive of "adhering". in either case the Statute is not pursued.

Mr Wilson held "giving aid and comfort" to be explanatory, not operative words; and that it was better to omit them —

Mr Dickenson. thought the addition of "giving aid & comfort" unnecessary & improper; being too vague and extending too far- He wished to know what was meant by the "testimony of two witnesses", whether they were to be witnesses to the same overt act or to different overt acts. He thought also that proof of an overt-act ought to be expressed as essential in the case.

Docr Johnson considered "giving aid & comfort" as explanatory of "adhering" & that something should be inserted in the definition concerning overt-acts. He contended that Treason could not be both agst. the U. States — and individual States; being an offence agst the Sovereignty which can be but one in the same community-

Mr. M{adison} remarked that "and" before "in adhering" should be changed into "or" otherwise both offences {viz of levying war, & of adhering to the Enemy} might be necessary to constitute Treason. He added that as the definition here was of treason against *the U. S.* it would seem that the individual States wd. be left in possession of a concurrent power so far as to define & punish treason particularly agst. themselves; which might involve double punishment.

It was moved that the whole clause be recommitted {which was lost, the voted being equally divided.}

N- H- no. Mas- no- Ct no- N- J ay- Pa ay- Del- no- Md. ay. Va. ay- N C- divd S- C-no. Geo- ay. —[Ayes — 5; noes — 5; divided — 1.]

Mr. Wilson & Docr. Johnson moved, that "or any of them" after "United States" be struck out in order to remove the embarrassment; which was agreed to nem. con —

Mr M{adison} This has not removed the embarrassment. The same Act might be treason agst. the United States as here defined — and agst a particular State according to its laws.

[a] Crossed out "or".

Mr Elseworth — There can be no danger to the Genl authority from this; as the laws of the U. States are to be paramount.

Docr Johnson was still of opinion there could be no Treason agst a particular State. It could not even at present, as the Confederation now stands; the Sovereignty being in the Union; much less can it be under the proposed System.

Col. Mason. The United States will have a qualified sovereignty only. The individual States will retain a part of the Sovereignty. An Act may be treason agst. a particular State which is not so against the U. States. He cited the Rebellion of Bacon in Virginia as an illustration of the doctrine.

Docr. Johnson: That case would amount to Treason agst the Sovereign, the supreme Sovereign, the United States —

Mr. King observed that the controversy relating to Treason might be of less magnitude than was supposed; as the legislature might punish capitally under other names than Treason.

Mr. Govr Morris and Mr Randolph wished to substitute the words of the British Statute

{and moved to postpone Sect. 2. art VII in order to consider the following substitute — "Whereas it is essential to the preservation of liberty to define precisely and exclusively what shall constitute the crime of Treason, it is therefore ordained, declared & established, that if a man do levy war agst. the U. S. within their territories, or be adherent to the enemies of the U. S. within the said territories, giving them aid and comfort within their territories or elsewhere, and thereof be provably attained of open deed by the People of his condition, he shall be adjudged guilty of Treason"}[9]

On this question

N. H. Mas- no. Ct. no. N. J- ay Pa. No. Del. no. Md. no. Va.- ay. N. C. no- S. C. no. Geo- no. [Ayes — 2; noes — 8.]

It was moved to strike out "agst United States" after "treason" so as to define treason generally — and on this question

Mas. ay- Ct. ay. N- J. ay. Pa ay. Del. ay. Md. ay. Va. no. N. C. no. S. C ay. Geo. ay. . [Ayes — 8; noes — 2.]

[9]Taken from *Journal*.

It was then moved to insert after "two witnesses" the words "to the same overt act".

Docr Franklin wished this amendment to take place — prosecutions for treason were generally virulent; and perjury too easily made use of against innocence

Mr. Wilson. much may be said on both sides. Treason may sometimes be practised in such a manner, as to render proof extremely difficult — as in a traitorous correspondence with an Enemy.

On the question — as to same overt act

N- H- ay- Mas- ay- Ct. ay. N. J. no- Pa. ay- Del- ay- Md ay. Va no- N. C. no- S. C. ay- Geo- ay- [Ayes — 8; noes — 3.]

Mr King moved to insert before the word "power" the word "sole", giving the U. States the exclusive right to declare the punishment of Treason.

Mr Broom 2ds. the motion-

Mr Wilson in cases of a general nature, treason can only be agst the U- States. and in such they shd have the sole right to declare the punishment — yet in many cases it may be otherwise. The subject was however intricate and he distrusted his present judgment on it.

Mr King this amendment results from the vote defining treason generally by striking out agst. the U. States; which excludes any treason agst particular States. These may however punish offences as high misdemesnors.

On inserting the word "sole". {It passed in the negative}

N- H. ay- Mas- ay. Ct no- N. J- no- Pa ay. Del. ay. Md no- Va- no- N- C- no- S. C. ay- Geo- no. [Ayes — 5; noes — 6.]

Mr. Wilson. the clause is ambiguous now. "Sole" ought either to have been inserted — or "against the U- S." to be reinstated.

Mr King no line can be drawn between levying war and adhering to enemy — agst the U. States and agst an individual States — Treason agst the latter must be so agst the former.

Mr Sherman, resistance agst. the laws of the U- States as distinguished from resistance agst the laws of a particular State, forms the line-

Mr. Elseworth- the U. S. are sovereign on one side of the line dividing the jurisdictions — the States on the other — each ought to have power to defend their respective Sovereignties.

Mr. Dickenson, war or insurrection agst a member of the Union must be so agst the whole body; but the Constitution should be made clear on this point.

The clause was reconsidered nem. con — & then, Mr. Wilson & Mr. Elseworth moved to reinstate "agst the U. S.". after "Treason" — on which question

N- H- no- Mas. no. Ct. ay- N- J- ay- Pa no- Del. no- Md ay. Va. ay- N- C. ay- S- C- no- Geo. ay — [Ayes — 6; noes — 5.]

Mr M—{adison} was not satisfied with the footing on which the clause now stood. As treason agst the U- States involves Treason agst. particular States, and vice versa, the same act may be twice tried & punished by the different authorities — Mr Govr Morris viewed the matter in the same lights —

{It was moved & 2ded to amend the Sentence to read — "Treason agst. the U. S. shall consist only in levying war against them, or in adhering to their enemies"- which was agreed to.}[10]

Col- Mason moved to insert the words "giving {them} aid comfort". as restrictive of "adhering to their Enemies &c"- the latter he thought would be otherwise too indefinite — This motion was agreed to {Cont: Del: & Georgia only being in the Negative}[10]

Mr L. Martin — moved to insert after conviction &c — "or on confession in open court" — and on the question, (the negative States thinking the words superfluous) {it was agreed to} N. H: ay- Mas- no- Ct. ay. N- J. ay- Pa. ay. Del. ay- Md ay- Va ay. N- C- divd S- C- no. Geo- no. [Ayes — 7; noes — 3; divided — 1.]

Art: VII. Sect — 2. as amended was then agreed to nem— con.[11]

Sect— 3— taken up.[12] "white & other" struck out nem con. as superfluous.

[10]Taken from *Journal*.

[11]See further Appendix A, Cl., CLVIII (88-91).

[12]Article VII, Sect. 3. "The proportions of direct taxation shall be regulated by the whole number of white and other free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, (except Indians not paying taxes) which number shall, within six years after the first meeting of the Legislature, and within the term of every ten years afterwards, be taken in such manner as the said Legislature shall direct."

Mr Elseworth moved to required the first census to be taken within "three" instead of "six" years from the first meeting of the Legislature — and on question

N- H- ay. Mas- ay Ct ay- N J- ay- Pa ay- Del. ay. Md ay Va ay- N- C- ay- S- C. no- Geo- no. [Ayes — 9; noes — 2.]

Mr King asked what was the precise meaning of *direct* taxation? No one answd.

Mr. Gerry moved {to add to the 3d Sect. art. VII, the following clause. "That from the first meeting of the Legislature of the U. S. until a Census shall be taken all monies for supplying the public Treasury by direct taxation shall be raised from the several States according to the number of their Representatives respectively in the first branch"}[13]

Mr. Langdon. This would bear unreasonably hard on N. H. and he must be agst it.

Mr. Carrol. opposed it. The number of Reps. did not admit of a proportion exact enough for a rule of taxation —

{Before any question the House}[14]

Adjourned.[15]

[13]Taken from *Journal*, but Madison had recorded the substance of this motion.

[14]Taken from *Journal*.

[15]See further, Appendix A, LXXXV-LXXXIX.

McHENRY

August 20.

The following one agreed to.

Sect. 2. Amended to read. Treason against the U. S. shall consist only in levying war against them, or in adhering to their enemies giving them aid and comfort. The legislature shall have power to declare the punishment of treason. No person shall be convicted of treason unless on confession in open court, or the testimony of two witnesses to the same overt act.

Mr. Mason moved to add to the 1 sect of the VII article.

To make sumptuary laws.

Governeur Morris. sump. laws were calculated to continue great landed estates for ever in the same families — If men had no temptation to dispose of their money they would not sell their estates.

Negatived.

Amended section 3 by striking out the words in the second line *white and other*, and the word six in the 5 line and substituting the word three — but adjourned without a question on the section.

COMMITTEE OF STYLE

To appoint a Treasurer by joint ballot;

To constitute tribunals inferior to the supreme court;

To make rules concerning captures on land and water;

To define and punish piracies and felonies committed on the high seas, to punish the counterfeiting of the securities, and current coin of the United States, and offences against the law of nations;

To declare war; and grant letters of marque and reprisal.

To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years.

To provide & maintain a navy;

To make rules for the government and regulation of the land and naval forces.

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

To make laws for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the Officers, and the authority of training the militia according to the discipline prescribed by the United States.

To establish uniform laws on the subject of bankruptcies.

To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may by cession of particular States and the acceptance of the Legislature become the seat of the Government of the United States, and to exercise like authority over all Places purchased, by the consent of the Legislature of the State, for the erection of Forts, Magazines, Arsenals, Dock Yards and other needful buildings.

To promote the progress of science and useful arts by securing for limited times to Authors and Inventors the exclusive right to their respective writings and discoveries.

And to make all laws that shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested, by this Constitution, in the government of the United States, or in any department or officer thereof.

COMMITTEE OF STYLE

All[4] debts contracted and engagements entered into, by or under the authority of Congress shall be as valid against the United States under this constitution as under the confederation.

Sect. 2. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. The Legislature shall have power to declare the punishment of treason. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court. No attainder of treason shall work corruption of blood, nor forfeiture, except during the life of the person attainted. The Legislature shall pass no bill of attainder nor any ex post facto laws.

Sect. 3. The proportions of direct taxation shall be regulated by the whole number of free citizens and inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, (except Indians not paying taxes) which number shall, within three years after the first meeting of the Legislature, and within the term of every ten years afterwards, be taken in such manner as the said Legislature shall direct.

Sect. 4. No tax or duty shall be laid by the Legislature on articles exported from any State. The migration or importation of such persons as the several States now existing shall think proper to admit shall not be prohibited by the Legislature prior to the year 1808 — but a tax or duty may be imposed on such importation not exceeding ten dollars for each person. Nor shall any regulation of commerce or revenue give preference to the ports of one State over those of another, or oblige Vessels bound to or from any State to enter, clear, or pay duties in another.

And all duties, imposts, and excises, laid by the Legislature, shall be uniform throughout the United States.

[4]The correct location of this clause is uncertain. It was considered and adopted in connection with the "powers of Congress", and so is inserted here.

thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.[10]

{(c)} Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by **three-fourths* of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Sect. 8. The Congress may be joint ballot appoint a treasurer. They shall have power.

{(*a*)} To lay and collect taxes, duties, imposts and excises; to pay the debts and provide for the common defence and general welfare[12] of the United States. {but all duties imposts & excises shall be uniform throughout the U. States.}[13]

{(*b*)} To borrow money on the credit of the United States.

*{In the entry of this Report is the printed Journal "two thirds" are substituted for "three fourths".[11] This change was made after the Report was received.}

[10]This paragraph has caused a great deal of confusion. The Report of the Committee of Detail on August 6 provided for a two-thirds vote of both houses to overrule the president's veto. On August 15 this was changed to three-fourths. The Committee on Style seem to have changed this back to two-thirds in this paragraph, but left it as three-fourths in the next. On September 12th, this was changed again to two-thirds.

[11]Madison is in error. The *Journal* reading is identical with his own. See above note 10.

[12]See Appendix A, CCLXXXI, CCCXLIV, CCCLXXII.

[13]Interlined by Madison.

COMMITTEE OF STYLE

{(*c*)} To regulate commerce with foreign nations, among the several states, and with the Indian tribes.

{(*d*)} To establish an uniform rule of naturalization[14] and uniform laws on the subject of bankruptcies throughout the United States.

{(*e*)} To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.

{(*f*)} To provide for the punishment of counterfeiting the securities and current coin of the United States.

{(*g*)} To establish post offices and post roads.

{(*i*)} To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

{(*j*)} To constitute tribunals inferior to the supreme court.

{(*k*)} To define and punish piracies and felonies committed on the high seas, and {*(punish)} offences against the law of nations.

{(*l*)} To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

{(*m*)} To raise and support armies: but no appropriation of money to that use shall be for a longer term than two years.

{(*n*)} To provide and maintain a navy.

{(*o*)} To make rules for the government and regulation of the land and naval forces.

{(*p*)} To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions.

{(*q*)} To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.

{(*r*)} To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, be-

*(punish) a typographical omission

[14]"naturalization", see Appendix A, CCL.

COMMITTEE OF STYLE

come the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings — And

{(*s*)} To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

Sect. 9. The migration or importation of such persons as the several states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

{(*a*)} The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

{(*b*)} No bill of attainder shall be passed, nor any ex post facto law.

{(*c*)} No capitation tax shall be laid, unless in proportion to the census herein before directed to be taken.

{(*d*)} No tax or duty shall be laid on articles exported from any state. {No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another — nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another.}[15]

{(*e*)} No money shall be drawn from the treasury, but in consequence of appropriations made by law.

{(*f*)} No title of nobility shall be granted by the United States. And no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any king whatever, from any king, prince, or foreign state.

Sect. 10. No state shall coin money, [16] nor emit bills of

[15] Interlined by Madison.

[16] The "n" of every "nor" in this section was crossed out by Madison.

ent States, and between a state, or the citizens thereof, and foreign States, citizens or subjects.

In cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Sect. 3. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood nor forfeiture, except during the life of the person attainted.

IV.

Sect. 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Sect. 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled be delivered up, and removed to the state having jurisdiction of the crime.

No person legally held to service or labour in one state, escaping into another, shall in consequence of regulations

Congs consequently might evade the disqualification in this instance. — He was neither seconded nor opposed; nor did any thing further pass on the subject.

Art. 1. Sect. 8.ª The Congress "may by joint ballot appoint a Treasurer"

Mr Rutlidge move to strike out this power, and let the Treasurer be appointed in the same manner with other officers.

Mr. Gorham & Mr. King said that the motion, if agreed, to would have a mischievous tendency. The people are accustomed & attached to that mode of appointing Treasurers, and the innovation will multiply objections to the System.

Mr. Govr. Morris remarked that if the Treasurer be not appointed by the Legislature, he will be more narrowly watched, and more readily impeached —

Mr. Sherman — As the two Houses appropriate money, it is best for them to appoint the officer who is to keep it; and to appoint him as they make the appropriation, not by joint, but several votes:

Genl Pinkney. The Treasurer is appointed by joint ballot in South Carolina. The consequence is that bad appointments are made, and the Legislature will not listen to the faults of their own officer.

On the motion to strike out

N. H.-ay. Mas. no. Ct. ay. N. J. ay. Pa. no. Del-ay- Md ay. Va. no. N- C. ay. S. C. ay. Geo- ay. [Ayes — 8; noes — 3.]

{"but all such duties imposts & excises, shall be uniform throughout the U- S-" was unanimously annexed to the power of taxation.}

Art. I. sect. 8: To define & punish piracies and felonies on the high seas, and "punish" offences against the law of nations.ª

Mr. Govr. Morris moved to strike out "punish" before the words "offences agst. the law of nations." so as to let these be *definable* as well as punishable, by virtue of the preceding member of the sentence.

ª Detail of Ayes and Noes, Vote 532, records the adoption of a motion to reconsider this clause.

Mr. Wilson hopes the alteration would by no means be made. To pretend to *define* the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance. that would make us ridiculous.

Mr. Govr The word *define* is proper when applied to *offences* in this case; the law of {nations} being often too vague and deficient to be a rule.

On the question to strike out the word "punish" {it passed in the affirmative}

N- H. ay. Mas- no. Ct. ay. N- J. ay. Pa. no. Del. ay Md. no. Va. no. N. C- ay- S- C- ay. Geo- no. [Ayes — 6; noes — 5.]

Docr. Franklin moved* to add after the words "post roads" Art {I} S ect. 8. "a power to provide for cutting canals where deemed necessary"[9]

Mr Wilson 2ded. the motion

Mr Sherman objected. The expence in such cases will fall on the U- States, and the benefit accrue to the places where the canals may be cut.

Mr Wilson. Instead of being an expence to the U. S. they may be made a source of revenue.

Mr. Madison suggested an enlargement of the motion into a power "a grant charters of incorporation where the interest of the U. S. might require & the legislative provisions of individual States may be incompetent". His primary object was however to secure an easy communication between the States which the free intercourse now to be opened, seemed to call for — The political obstacles being removed, a removal of the natural ones as far as possible ought to follow. Mr. Randolph 2ded. the proposition.

Mr King thought the power unnecessary.

Mr Wilson. It is necessary to prevent *a State* from obstructing the *general* welfare.

*{This motion by Dr. Franklin not stated in the printed Journal, as are some other motions.}

[9]Upon this discussion, see Appendix A, CCLVII-CCLX, CCLXXVIII, CCCL, CCCLIII, CCCLXXIV.

ay. Md. ay. Va. no. N-C. no. S-C. ay. Geo. no. [Ayes — 6; noes — 4; divided — 1.]

The remainder of the paragraph was then remoulded and passed as follows viz— "No State shall without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay"

Art II. sect. 1. (paragraph 6) "or the period for chusing another president arrive" was changed into "or a President {shall} be elected" comformably to a vote of the day of

Mr. Rutlidge and Docr Franklin moved to annex to the end paragraph 7. sect. 1. art II— "and he (the President) shall not receive, within that period, any other emolument from the U. S. or any of them." on which question

N- H. ay- Mas. ay. Ct. no. N. J. no. Pa ay. Del. no. Md. ay- Va. ay. N. C. no. S- C. ay. Geo- ay. [Ayes — 7; noes — 4.]

Art: II. sect. 2. "he shall have power to grant reprieves and pardons for offences against the U. S. &c"

Mr Randolph moved to "except cases of treason". The prerogative of pardon in these cases was too great a trust. The President may himself be guilty. The Traytors may be his own instruments.

Col: Mason supported the motion.

Mr Govr Morris had rather there should be no pardon for treason, than let the power devolve on the Legislature.

Mr Wilson. Pardon is necessary for cases of treason, and is best placed in the hands of the Executive. If he be himself a party to the guilt he can be impeached and prosecuted.

Mr. King thought it would be inconsistent with the Constitutional separation of the Executive & Legislative powers to let the prerogative be exercised by the latter — A Legislative body is utterly unfit for the purpose. They are governed too much by the passions of the moment. In Massachusetts, one assembly would have hung all the insurgents in that State: the next was equally disposed to pardon them all. He suggested the expedient of requiring the concurrence of the Senate in Acts of Pardon.

Mr. Madison admitted the force of objections to the Leigslature, but the pardon of treasons was so peculiarly improper for the President that he should acquiesce in the transfer of it to the former, rather than leave it altogether in the hands of the latter. He would prefer to either an association of the Senate as a Council of advice, with the President.

Mr Randolph could not admit the Senate into a share of the Power. the great danger of liberty lay in a combination between the President & that body —

Col: Mason. The Senate has already too much power —There can be no danger of too much lenity in legislative pardons, as the Senate must con concur, & the President moreover can require ⅔ of both Houses[4]

On the motion of Mr. Randolph

N. H. no- Mas. no- Ct. divd. N- J- no. Pa. no- Del. no. Md no- Va ay- N- C. no- S. C. no. Geo- ay. [Ayes — 2; noes — 8; divided — 1.]

Art II. sect. 2. (paragraph 2) To the end of this, Mr Governr. Morris moved to annex "but the Congress may by law vest the appointment of such inferior Officers as they think proper, in the President alone, in the Courts of law, or in the heads of Departments." Mr Sherman 2ded. the motion

Mr. Madison. It does not go far enough if it be necessary at all — Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices.

Mr Govr Morris There is no necessity. Blank Commissions can be sent —

On the motion

N. H. ay. Mas- no- Ct ay. N. J. ay. Pa. ay. Del. no. Md. divd Va no. N. C. ay- S C no. Geo- no- [Ayes — 5; noes — 5; divided — 1.]

The motion being lost by the equal division [of votes.] It was urged that it be put a second time, some such provision

[4]See also Appendix A, CLVIII (79).

THE RECORDS

OF THE

FEDERAL CONVENTION

of 1787

EDITED BY

MAX FERRAND

PROFESSOR OF HISTORY IN YALE UNIVERSITY

VOLUME III

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MCMXI

CXLVI*b*. Luther Martin before the Maryland House of Representatives.[1]

Maryland Novr. 29th. 1787. —

Mr. Speaker.

When I join'd the Convention I found that Mr. Randolph had laid before that Body certain propositions for their consideration, and that Convention had entered into many Resolutions, respecting their manner of conducting the Business one of which was that seven States might proceed to Business, and therefore four States composing a Majority of seven, might eventually give the Law to the whole Union. Different instructions were given to Members of different States — The Delegates from Delaware were instructed not to infringe their Local Constitution — others were prohibited their assent to any duty in Commerce: Convention enjoined all to secrecy; so that we had no opportunity of gaining information by a Correspondence with others; and what was still more inconvenient extracts from their Journals were prohibited even for our own information — It must be remembered that in forming the Confederacy the State of Virginia proposed, and obstinately contended (tho unsupported by any other) for representation according to Numbers: and the second resolve now brought forward by an Honourable Member from that State was formed in the same spirit that characteriz'd its representatives in their endeavours to increase its powers and influence in the Federal Government. These Views in the larger States, did not escape the observation of the lesser and meetings in private were formed to counteract them: the subject however was discuss'd with coolness in Convention, and hopes were formed that interest might in some points be brought to Yield to reason, or if not, that at all events the lesser States were not precluded from introducing a different System; and particular Gentlemen were industriously employed in forming such a System at those periods in which Convention were not sitting.

At length the Committee of Detail brought forward their Resolutions which gave to the larger States the same inequality in the Senate that they now are proposed to have in the House of Representatives that they now are proposed to have in the House of Representatives — Virginia, Pennsylvania and Massachusetts

[1]See CXLVI*a*, note 1. This document represents an earlier stage of Martin's *Genuine Information* (CLVIII).

would have one half — all the Officers and even the President were to be chosen by the Legislative: so that these three States might have usurped the whole power. The President would always have been from one of the larger States and so chosen to have an absolute negative, not only on the Laws of Congress but also on the Laws of each respective State in the Union. Should the representation from the other States be compleat, and by a Miracle ten States be so united as upon any occasion to procure a Majority; yet the President by his Negative might defeat the best intentions for the public good. Such Government would be a Government by a Junto and bind hand and foot all the other States in the Union. On this occasion the House will please to remember that Mr. Bo was in the Chair, and General Washington and the Venerable Franklin on the floor, and led by State influence, neither of them objected to this System, but on the Contrary it seemed to meet their warm and cordial approbation. — I revere those worthy Personages as much as any man can do, but I could not compliment them by a Sacrafice of the trust reposed in me by this State by acquiescing in their opinion. Then it was Mr. Speaker that those persons who were labouring for the general good, brought forward a different System — The absence of Mr. McHenry unhappily left Maryland with only two representatives, and they differed: New Hampshire Delegates were also absent. Mr. Patterson from Jersey introduced this new System, by which it was proposed, that the Laws of the Confederacy should be the Laws of each State, and therefore the State Judiciaries to have Cognizance in the first instance and the Federal Courts to have an Apelant Jurisdiction only —

The first measure that took place on the Jersey System was to pass a vote not to receive it — Three parties now appeared in Convention; one were for abolishing all the State Governments; another for such a Government as would give an influence to particular States — and a third party were truly Federal, and acting for general Equality — They were for considering, reforming and amending the Federal Government, from time to time as experience might point out its imperfections, 'till it could be made competent to every exigence of State, and afford at the same time ample security to Liberty and general Welfare. But this scheme was so opposite to the views of the other two, that the Monarchical party finding little chance of succeeding in their

wishes joined the others and by that measure plainly shewed they were endeavouring to form such a Government as from its inequality must bring in time their System forward, or at least much nearer in practice than it could otherwise be obtained —

When the principles of opposition were thus formed and brought forward by the 2d. S: respecting the manner of representation, it was urged by a Member of Pennsylvania, that nothing but necessity had induced the larger States to give up in forming the Confederacy, the Equality of Representation according to numbers — That all governments flowed from the People and that their happiness being the end of governments they ought to have an equal Representation. On the contrary it was urged by the unhappy Advocates of the Jersey System that all people were equally Free, and had an equal Voice if they could meet in a general Assembly of the whole. But because one Man was stronger it afforded no reason why he might injure another, nor because ten leagued together, they should have the power to injure five; this would destroy all equallity. That each State when formed, was in a State of Nature as to others, and had the same rights as Individuals in a State of Nature — If the State Government had equal Authority, it was the same as if Individuals were present, because the State Governments originated and flowed from the Individuals that compose the State, and the Liberty of each State was what each Citizen enjoyed in his own State and no inconvenience had yet been experienced from the inequality of representation in the present Federal Government. Taxation and representation go hand and hand, on the principle alone that, none should be taxed who are not represented; But as to the Quantum, those who possess the property pay only in proportion to the protection they receive — The History of all Nations and sense of Mankind shew, that in all former Confederacies every State had an equal voice. Moral History points out the necessity that each State should vote equally — In the Cantons of Switzerland those of Bene & Lucerne have more Territory than all the others, yet each State has an equal voice in the General Assembly. The Congress is forming the Confederacy adopted this rule on the principle of Natural right — Virginia then objected. This Federal Government was submitted to the consideration of the Legislatures of the respective States and all of them proposed some amendments; but not one that this part

should be altered. Hence we are in possession of the General Voice of America on this subject. When baffled by reason the larger States possitively refused to yield — the lesser refused to confederate, and called on their opponents to declare that security they could give to abide by any plan or form of Government that could now be devised. The same reasons that now exist to abolish the old, might be urged hereafter to overthrow the New Government, and as the methods of reform prescribed by the former were now utterly disregarded, as little ceremony might be used in discarding the latter — It was further objected that the large States would be continually increasing in numbers, and consequently their influence in the National Assembly would increase also: That their extensive Territories were guaranteed and we might be drawn out to defend the enormous extent of those States, and encrease and establish that power intended in time to enslave ourselves — Threats were thrown out to compel the lesser States to confederate — They were told this would be the last opportunity that might offer to prevent a Dissolution of the Union, that once dissolve that Band which held us together and the lesser States had no security for their existence, even for a moment — The lesser States threatened in their turn they they would not lay under the imputation of refusing to confederate on equitable conditions: they threatened to publish their own offers and the demands of others, and to appeal to the World in Vindication of their Conduct.

At this period there were eleven States represented in Convention on the question respecting the manner of appointing Delegates to the House of Representatives — Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina and Georgia adopted it as now handed to the consideration of the People. — Georgia now insignificant, with an immense Territory, looked forward to future power and Aggrandizement. Connecticut, New York, Jersey, and Delaware were against the Measure and Maryland was unfortunately divided — On the same question respecting the Senate, perceiving the lesser States would break up Convention altogether, if the influence of that branch was likewise carried against them, the Delegates of Georgia differed in sentiment not on principle but on expediency, and fearing to lose every thing if they persisted, they did not therefore vote being divided. Massachusetts, Pennsylvania,

Virginia, North Carolina, and South Carolina were in the affirmative, and New York, Connecticut, Jersey, Delaware & Maryland were in the Negative. Every thing was now at a stand and little hopes of agreement, the Delegates of New York had left us determined not to return, and to hazard every possible evil, rather than to Yield in that particular; when it was proposed that a conciliating Committee should be formed of one member from each State — Some Members possitively refused to lend their names to this measure others compromised, and agreed that if the point was relinquished by the larger States as to the Senate — they would sign the proposed Constitution and did so, not because they approved it but because they thought something ought to be done for the Public — Neither General Washington nor Franklin shewed any disposition to relinquish the superiority of influence in the Senate. I now proposed Convention should adjourn for consideration of the subject, and requested leave to take a Copy of their proceedings, but it was denied, and the Avenue thus shut to information and reflection —

Article 1st.

S: 1st. A Government consisting of two Branches advocated by some was opposed by others -- That a perfect Government necessarily requiring a Check *over them* did not require it over *States* and History could furnish no instance of such a second branch in Federal Governmts — The separate States are competent to the Government of Individuals and a Government of *States* ought to be *Federal*, and which the object of calling Convention, and not to establish a *National Government*. It begins We the People — And the powers are made to flow from them in the first instance. That in Federal Governments an equal voice in each State is essential, as being all in a *State of Nature* with respect to each other. Whereas the only figure in this Consitution that has any resemblance to a federal one, is the equality of Senate — but the 4th Section gives the power to Congress to strike out, at least to render Nugatory this, the most valuable part of it. It cannot be supposed that any State would refuse to send Representatives, when they would be bound whether they sent Deputies or not, and if it was intended to relate to the cases of Insurrection or Invasion, why not by express words confine the power of these objects?

S: 6. By this Article the Senators when elected are made independant of the State they represent. They are to serve Six Years, to pay themselves out of the General Treasury, and are not paid by the State, nor can be recalled for any misconduct or sacrifice of the Interest of their State that they make before the expiration of that period. They are not only Legislative, but make a part of the Executive, which all wise Governments have thought it essential to keep seperated. They are the National Council; and none can leave their private concerns and their Homes for such a period and consent to such a service, but those who place their future views on the emoluments flowing from the General Government — Tho'a Senator cannot be appointed to an office created by himself, He may to any that has been antecedently established; and by removing Old Officers, to new Offices, their places may be occupied by themselves and thus the Door opened to evade and infringe the Constitution. When America was under the British Dominion every matter was conducted within a narrow Circle in the Provincial Government, greatly to the ease and convenience of the People. The Habits thus acquired are opposed to extensive Governments, and the extent of this, as a National one, cannot possibly be ever carried into effect —

S: 2. Slaves ought never to be considered in Representation, because they are Property. They afford a rule as such in Taxation; but are Citizens intrusted in the General Government, no more than Cattle, Horses, Mules or Asses; and a Gentlemen in Debate very pertinently observed that he would as soon enter into Compacts, with the Asses Mules, or Horses of the Ancient Dominion as with their Slaves — When there is power to raise a revenue by direct Taxation, each State ought to pay an equal Ratio; Whereas by taxing Commerce some States would pay greatly more than others.

S: 7. It was contended that the Senate derived their powers from the People and therefore ought to have equal priviledges to the Representation That it would remove all ground for contest about originating Money Bills, what Bills were so or not, and how far amendments might be made, but nothing more could be obtained from the power of the larger States on that subject than what appears in the proposed Constitution. In Great Britain the King having Hereditary rights, and being one of the three Estates that compose the Legislature has obtained a Voice in the passage

of all Acts that bear the title of laws. But the Executive here have no distinct rights, nor is their President likely to have more understanding than the two Branches of the Legislature. Additional weight is thus unnecessarily given to the large States who voting by numbers will cohere to each other, or at least among themselves, and thus easily carry, or defeat any measure that requires a Majority of two thirds.

S: 8. By the word Duties in this Section is meant Stamp Duties. This power may be exercised to any extent, but it has likewise this dangerous tendency it may give the Congress power by establishing duties on all Contracts to decide on cases of that nature, and ultimately draw the dicision of the Federal Courts, which will have sufficient occupation by the other powers given in this Section. They are extensive enough to open a sluice to draw the very blood from your Veins. They may lay direct Taxes by assessment, Poll Tax, Stamps, Duties on Commerce, and excise everything else — all this to be collected under the direction of their own Officers, and not even provided that they shall be Inhabitants of the respective States whey they are to act, and for which many reasons will not be the case: and should any Individual dare to dispute the conduct of an Excise Man, ransacking his Cellars he may be hoisted into the Federal Court from Georgia to vindicate his just rights, or to be punished for his impertinence. In vain was it urged that the State Courts ought to be competent to the decision of such cases: The advocates of this System thought State Judges would be under State influence and therefore not sufficiently independant. But this is not all, they would either trust your Juries for altho matters of Fact are triable by Juries in the Inferior Courts the Judges of the Supreme Court on *appeal* are to decide on *Law* and *fact* both. In this Manner Mr. Speaker our rights are to be tried in all disputes between the Citizens of one State and another, between the Citizens and Foreigners, and between the Citizens and these Revenue Officers of the General Government. As to other cases the Constitution is silent, and it is very doubtful if we are to have the priviledge of Tryal by Jury at all, where the cause originates in the Supreme Court. Should the power of these Judiciaries be incompetent to carry this extensive plan into execution, other, and more certain Engines of power are supplied by the standing Army — unlimited as to number or its duration, in addition to this Government has

the entire Command of the Militia, and may call the whole Militia of any State into Action, a power, which it was vainly urged ought never to exceed a certain proportion. By organizing the Militia Congress have taken the whole power from the State Governments; and by neglecting to do it and encreasing the Standing Army, their power will increase by those very means that will be adopted and urged as an ease to the People.

Nothing could add to the mischevious tendency of this system more than the power that is given to suspend the Act of Ha: Corpus — Those who could not approve of it urged that the power over the Ha: Corpus ought not to be under the influence of the General Government. It would give them a power over Citizens of particular States who should oppose their encroachments, and the inferior Jurisdictions of the respective States were fully competent to Judge on this important priviledge; but the Allmighty power of deciding by a call for the question, silenced all opposition to the measure as it too frequently did to many others.

S: 9. By this Article Congress will obtain unlimited power over all the Ports in the Union and consequently acquire an influence that may be prejudicial to general Liberty. It was sufficient for all the purposes of General Government that Congress might lay what Duties they thought proper, and those who did not approve the extended power here given, contended that the Establishment of the Particular ports ought to remain with the Government of the respective States; for if Maryland for instance should have occasion to oppose the Encroachments of the General Government — Congress might direct that all Vessels coming into this Bay, to enter and clear at Norfolk, and thereby become as formidable to this State by an exercise of this power, as they could be by the Military arrangements or Civil Judiciaries. That the same reason would not apply in prohibiting the respective States from laying a Duty on Exports, as applied to that regulation being exercised by Congress: in the latter case a revenue would be drawn from the productive States to the General Treasury, to t[?] case of the unproductive, but particular States might be desirous by this method to contribute to the support of their Local Government or for the Encouragement of their Manufactures.

Article 2nd.

S: 1st. A Variety of opinion prevailed on this Article. Mr. Hamilton of New York wanted the President to be appointed by the Senate, others by both Branches, others by the People at large — others that the States as States ought to have an equal voice — The larger States wanted the appointment according to numbers — those who were for a one Genl. Government, and no State Governments, were for a choice by the People at large, and the very persons who would not trust the Legislature to vote by States in the Choice, from a fear of Corruption, yet contended nevertheless for a Standing Army, and before this point was finally adjusted I had left the Convention.

As to the Vice President, the larger States have a manifest influence and will always have him of their choice. The power given to these persons over the Army, and Navy, is in truth formidable, but the power of Pardon is still more dangerous, as in all acts of Treason, the very offence on which the prosecution would possibly arise, would most likely be in favour of the Presidents own power. —

Some would gladly have given the appointment of Ambassadors and Judges to the Senate, some were for vesting this power in the Legislature by joint ballot, as being most likely to know the Merrit of Individuals over this extended empire. But as the President is to nominate, the person chosen must be ultimately his choice and he will thus have an army of civil officers as well as Military — If he is guilty of misconduct and impeached for it by the first branch of the Legislature he must be tried in the second, and if he keeps an interest in the large States, he will always escape punishment — The impeachment can rarely come from the Second branch, who are his Council and will be under his influence.

S: 3rd. It was highly reasonable that Treason against the United States should be defined; resistence in some cases is necessary and a Man might be a Traitor to the General Government in obeying the Laws of his own State, a Clause was therefore proposed that wherever any State entered into Contest with the General Government, that during such Civil War, the general Law of Nations, as between Independent States should be the governing rule between them; and that no Citizen in such case of the said State should be deemed guilty of Treason, for acting

against the General Government, in Conformity to the Laws of the State of which he was a member: but this was rejected.

Article 6th.

The ratification of this Constitution is so repugnent to the Terms on which we are all bound to amend and alter the former, that it became a matter of surprise to many that the proposition could meet with any countanance or support. Our present Constitution expressly directs that all the States must agree before it can be dissolved; but on the other hand it was contended that a Majority ought to govern — That a dissolution of the Federal Government did not dissolve the State Constitutions which were paramount the Confederacy. That the Federal Government being formed out of the State Governments the People at large have no power to interfere in the *Federal Constitution* Nor has the *State* or *Federal* Government any power to confirm a new Institution. That this Government if ratified and Established will be *immediately* from the *People*, paramount the *Federal Constitution* and operate as a dissolution of it.

Thus Mr. Speaker, I have given to this Honorable House such information, as my situation enabled me to do, on the Subject of this proposed Constitution. If I have spoke with freedom, I have done no more than I did in Convention. I have been under no influence from the expectation of ever enjoying any Office under it, and would gladly yield what little I have saved by Industry, and the Emoluments of my profession to have been able to present it to the Public[1] in [a] different form. I freely [own, that it did not] meet my approbation, and [ ] this House will do [ ] believe that [I have conducted myself] freeman and a fruitful servant of the [ ] to the best of my Judgment for the Gen [ ]

CXLVII. James Wilson in the Pennsylvania Convention.[2]

November 30, 1787.

Mr. Wilson. It is objected that the number of members in the House of Representatives is too small. This is a subject somewhat embarrassing, and the convention who framed the articles felt the embarrassment. . . .

[1] A part of the MS. is torn off. Words in brackets are partly legible.

[2] McMaster and Stone, *Pennsylvania and the Federal Constitution*, 287-289.

The convention endeavored to steer a middle course, and when we consider the scale on which they formed their calculation, there are strong reasons why the representation should not have been larger. On the ratio that they have fixed, of one for every

CL. JAMES WILSON IN THE PENNSYLVANIA CONVENTION.[1]

December 7, 1787

. . . I shall beg leave to premise one remark, that the convention, when they formed this system, did not expect they were to deliver themselves, their relations and their posterity, into the hands of such men as are described by the honorable gentlemen in opposition. They did not suppose that the legislature, under this constitution, would be an *association of demons*. They thought that a proper attention would be given by the citizens of the United States, at the general election, for members to the House of Representatives; they also believed that the particular states would nominate as good men as they have heretofore done, to represent them in the Senate. . . .

The Convention thought further (for on this very subject, there will appear caution, instead of imprudence, in their transactions) they considered, that if suspicions are to be entertained, they are to be entertained with regard to the objects in which government have separate interests and separate views from the interests and views of the people. To say that officers of government will oppress, when nothing can be got by oppression, is making an inference, bad as human nature is, that cannot be allowed. . . .

Whenever the general government can be a party against a citizen, the trial is guarded and secured in the constitution itself, and therefore it is not in its power to oppress the citizen. In the case of treason, for example, though the prosecution is on the part of the United States, yet the Congress can neither define nor try the crime. If we have recourse to the history of the different governments that have hitherto subsisted, we shall find that a very great part of their tyranny over the people has arisen from the extension of the definition of treason. . . .

. . . Sensible of this, the Convention has guarded the people against it, by a particular and accurate definition of treason.

It is very true that trial by jury is not mentioned in civil cases; but I take it, that it is very improper to infer from hence, that it

[1]McMaster and Stone, *Pennsylvania and the Federal Constitution*, 351-353.

was not meant to exist under this government. Where the people are represented — where the interest of government cannot be separate from that of the people, (and this is the case in trial between citizen and citizen) the power of making regulations with respect to the mode of trial, may certainly be placed in the legislature; for I apprehend that the legislature will not do wrong in an instance from which they can derive no advantage. These were not all the reasons that influenced the convention to leave it to the future Congress to make regulations on this head.

By the constitution of the different States, it will be found that no particular mode of trial by jury could be discovered that would suit them all. The manner of summoning jurors, their qualifications, of whom they should consist, and the course of their proceedings, are all different, in the different States; and I presume it will be allowed a good general principle, that in carrying into effect the laws of the general government by the judicial department, it will be proper to make the regulations as agreeable to the habits and wishes of the particular States as possible; and it is easily discovered that it would have been impracticable, by any general regulation, to have given satisfaction to all. We must have thwarted the custom of eleven or twelve to have accommodated any one. Why do this, when there was no danger to be apprehended from the omission? We could not go into a particular detail of the manner that would have suited each State.

Time, reflection, and experience, will be necessary to suggest and mature the proper regulations on this subject; time and experience were not possessed by the convention; they left it therefore to be particularly organized by the legislature — the representatives of the United States — from time to time, as should be most eligible and proper.

CLI. The Landholder [Oliver Ellsworth], VI.[1]

Just at the close of the Convention, whose proceedings in general were zealously supported by Mr. Mason, he moved for a clause that no navigation act should ever be passed but with the consent of two-thirds of both branches; urging that a navigation act might otherwise be passed excluding foreign bottoms from

[1]Robertson, *Debates of the Convention of Virginia, 1788* (2d edit., 1805), pp. 377-382.

carrying American produce to market, and throw a monopoly of the carrying business into the hands of the eastern states who attend to navigation, and that such an exclusion of foreigners would raise the freight of the produce of the southern states, and for these reasons Mr. Mason would have it in the power of the southern states to prevent any navigation act. This clause, as unequal and partial in the extreme to the southern states, was rejected; because it ought to be left on the same footing with other national concerns, and because no state would have a right to complain of a navigation act which should leave the carrying business equally open to them all. Those who preferred cultivating their lands would do so; those who chose to

vention, and many in the United States. I do not know what explanation the honorable gentleman asks. I can say with great truth, that the honorable gentleman, in private conversation with me, expressed himself against it: Neither did I ever hear any of the delegates from this state advocate it.

Mr. *Madison* declared himself satisfied with this, unless the committee thought themselves entitled to ask a further explanation.

After some desultory remarks, Mr. *Mason* continued. — I have heard that opinion advocated by gentlemen, for whose abilities, judgment, and knowledge, I have the highest reverence and respect.

. . . The last clause is still more improper. To give them cognizance in disputes between a state and the citizens thereof, is utterly inconsistent with reason or good policy.

Here Mr. *Nicholas* arose, and informed Mr. *Mason*, that his interpretation of this part was not warranted by the words.

Mr. *Mason* replied, that if he recollected rightly, the propriety of the power as explained by him, had been contended for; but that as his memory had never been good, and was now much impaired from his age, he would not insist on this interpretation.

CCXV. James Madison in the Virginia Convention.[1]

June 20, 1788.

(The 1st and 2d sections, of the 3d article, still under consideration.)

Mr. *Madison*. — . . . It may be proper to remark, that the organi-

[1] P.L. Ford, *Essays on the Constitution*, 161-166. First printed in the *Connecticut Courant*, December 10, 1787.

zation of the general government for the United States, was, in all its parts, very difficult. — There was a peculiar difficulty in that of the Executive. — Every thing incident to it, must have participated of that difficulty. — That mode which was judged most expedient was adopted, till experience should point out one more eligible. — This part was also attended with difficulties. It claims the indulgence of a fair and liberal interpretation. I will not deny that, according to my view of the subject, a more accurate attention might place it in terms which would exclude some of the objections now made to it. But if we take a liberal construction, I think we shall find nothing dangerous or inadmissible in it. In compositions of this kind, it is difficult to avoid technical terms which have the same meaning. An attention to this may satisfy gentlemen, that precision was not so easily obtained as may be imagined. I will illustrate this by one thing in the constitution. — There is a general power to provide courts to try felonies and piracies committed on the high seas. — *Piracy* is a word which may be considered as a term of the law of nations. — Felony is a word unknown to the law of nations, and is to be found in the British laws, and from thence adopted in the laws of these states. It was thought dishonorable to have recourse to that standard. A technical term of the law of nations is therefore used, that we should find outselves authorized to introduce it into the laws of the United States. . . .

. . . His criticism is that the judiciary, has not been guarded from an increase of the salary of the judges. I wished myself, to insert a restraint on the augmentation as well as diminution of their compensation; and supported it in the convention. — But I was over-ruled. I must state the reasons which were urged. — They had great weight. — The business must increase. If there was no power to increase their pay, according to the increase of business, during the life of the judges, it might happen, that there would be such an accumulation of business, as would reduce the pay to a most trivial consideration. This reason does not hold as to the president. For in the short period which he presides, this cannot happen. His salary ought not therefore to be increased. It was objected yesterday, that there was no provision for a jury from the vicinage. If it could have been done with safety, it would not have been opposed. It might so happen that a trial would be impracticable in the county. Suppose a rebellion in a whole district, would it not be impossible to get a jury? The trial by jury is

held as sacred in England as in America. There are deviations of it in England: yet greater deviations have happened here since we established our independence, than have taken place there for a long time, though it be left to the legislative discretion. It is a misfortune in any case that this trial should be departed from, yet in some cases it is necessary. It must be therefore left to the discretion of the legislature to modify it according to circumstances. This is a complete and satisfactory answer.

CCXVI. ALEXANDER HAMILTON IN THE NEW YORK CONVENTION.[1]

June 20, 1788.

In order that the committee may understand clearly the principles on which the general Convention acted, I think it necessary to explain some preliminary circumstances. Sir, the natural situation of this country seems to divide its interests into different classes. There are navigating and non-navigating states. The

[1]Elliot, *Debates in State Conventions on the Adoption of the Federal Constitution*, II, 235-237.

II, 136, 143, 144, 159, 167, 182, (304), 308, 569, 595, 655.

[Clause 6]. To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

II, 144, 168, 182, (312), 316, (320), 570, 595, 655.

[Clause 7]. To establish Post Offices and post Roads;

*II, 135, 144, 159, 168, 182, (303), 304, (311), 569, 595, 615, (620), 655.

[Clause 8]. To promote the Progress of Science and useful Arts, by securing for limited Time to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

II, (321, 322), 325, (505), 509, 570, 595, 655. III, (122).

[Clause 9]. To constitute Tribunals inferior to the supreme Court;

I, (118), 125, (127, 226), 231, (237, 292). II, (38), 45, 133, 144, 168, 182, (313), 315, (320), 570, 595, 655. III, 206.

[Clause 10]. To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

II, 143, 168, 182, (312), 315, (320), 570, 595, 614, 655. III, 332.

[Clause 11]. To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

II, 143, 144, 168, 182, (313), 315, 318, (320, 322), 326, 328, (333), 505, (508), 570, 595, 655. III, 405.

[Clause 12]. To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

II, 145, 158, 168, 182, (323), 329, (333), 334, (341, 505), 508, 509, 570, 595, (633), 635, 656. III, 207, 319.

[Clause 13]. To provide and maintain a Navy;

II, 143, 158, 168, 182, (323), 330, (333), 570, 595, 656.

[Clause 14]. To make Rules for the Government and Regulation of the land and naval Forces;

II, (323), 330, (333) 570, 595, 656.

[Clause 15]. To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions;

I, 21, 47, 54, 61, 245, (247). II, 144, (159), 168, 182, (337), 344, (382), 389, 570, 595, 656. III, 148, (157), 207, 285, 318, 527.

[Clause 16]. To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

I, (292). II, (135), 136, 159, 168, (323), 330, (352), 356, (368), 377, (380), 384, (394), 570, 595, (616), 656. III, 118, (157), 208, 259, (319), 370, 420.

[Clause 17]. To exercise exclusive Legislation . . . over . . . the Seat of the Government . . . and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;

II, (117), 127, (321), 325, (505, 506), 509, 510, 570, 595, 656. III, 122, 408.

[Clause 18]. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . .

II, 144, 168, 182, (337), 344, 570, 596, 656. III, 239.

Section 9. [Clause 1]. The Migration or Importation of such Persons . . . shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

II, (95), 143, 169, 183, 220, (354), 364, (366), 369, (378, 396), 400, (408), 415, (446), 449, 571, 596, 610, 656. III, 84, 135, (149), 160, (165), 210, 253, 324, (332), 334, 346, 355, 360, 361, 367, 376, 436, 438, 439, 442.

[Clause 2]. The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

II, (334), 341, (435), 438, 576, 596, 656. III, (149, 157), 213, (290).

[Clause 3]. No Bill of Attainder or ex post facto Law shall be passed.

II, (368), 375, (378), 448, 571, 596, 610, (617), 656. III, (165).

[Clause 4]. No Capitation, or other direct Tax shall be laid, unless in Proportion to the Census . . .

II, 143, 169, 183, 366, (374, 378, 396), 400, (409), 417, 572, 596, (610), 618, 656. III, 83, 149, 360.

[Clause 5]. No Tax or Duty shall be laid on Articles exported from any State.

I, 592. II, 95, 142, 143, 168, 183, (303), 305, (354), 359, (365), 374, 571, 596, 657. III, 149.

(236), 238, 244, (247, 292). II, (37), 41, 44, 132, 146, 172, 186, 335, (341), (422), 428, (432), 575, 600, 621, (638), 660. III, (169), 220, 332, 391.

Section 2. [Clause 1]. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

I, 22, (28), 211, (220), 223, 231, (232, 237), 238, 244, (247, 292). II, (39), 46, 132, (136), 146, 157, 160, 170, 172, 183, 186, (335), 342, 367, (396), 400, (406, 422, 423), 428, 430, (432), 576, 600, 621, 660. III, (156, 169), 220, (240), 407.

[Clause 2]. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases . . . appellate Jurisdiction, both as to Law and Fact. . . .

I, 22, (28), 244, (247, 292). II, 147, 157, 173, 186, (424), 431, 432, (434), 437, 576, 601, 661. III, (156), 220, (273, 287, 299).

[Clause 3]. The Trial of all Crimes, . . . shall be by Jury; . . .

II, 144, 173, 187, (433, 434), 438, (444), 576, 587, 601, 628, 635, 661. III, 101, 150, 163, (167), 221, (250), 298), 309, 332, (349), 352.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same over Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

II, 136, 144, 168, 182, (337), 345, 351, 571, 601, 626, 661. III, 158, (163), 223.

RESOLUTIONS

VIRGINIA AND KENTUCKY

PENNED BY

MADISON, JAMES, PRES. U.S., 1751-1836
AND
JEFFERSON, THOMAS, PRES. U.S., 1743-1820

IN RELATION TO THE

ALIENS AND SEDITION LAWS

Itaelex scripta est.

RICHMOND
Printed by Shepherd & Pollard

1826

WILLIAM WIRT, ESQUIRE.
RICHMOND.

PREFACE

The administration of Mr. John Adams was a dark day for the Republic. Then, Alien and Sedition acts were let loose upon us: the purity of the Constitution itself was violated by the madness of party: and those Rights which had been respectively reserved to the *States* and to the *People*, were exposed to the most fearful jeopardy by the usurpations of the Federal Government.

But, the friends of the Constitution did not "despair of the Republic." Though the liberty of Speech and of the Press were invaded; though the power and patronage of the Government were exerted to intimidate or seduce the people; the Republicans did not abandon the cause of their Country. Their resistance continued with the crisis: the form of it only was varied. While Mr. Jefferson remained in the Senate of the United States, and Mr. Gallatin in the House of Representatives, most of their most able and active friends, in some of the States, retired from the walks of the General Government, and retreated to the State Legislatures; in which great citadels of the public Liberty, they proposed to re-assert the true principles of the Government. The Republicans succeeded; and the Constitution was saved.

Among the most memorable productions of those times, were the Resolutions and Reports, which were adopted by the Legislatures of Kentucky and Virginia. These were penned by Jefferson and Madison. To Mr. Madison is due, the honor of having drafted the Virginia Resolutions of the 21st December, 1798; and that masterly Vindication of them, which was adopted by the Legislature of Virginia during the session of '99-1800: a paper, which is familiarly known by the name of "*Madison's Report*," and which deserves to last as long as the Constitution itself.

The Resolutions of Kentucky, were submitted to the Legislature of that State, by Mr. John Breckenridge, and adopted by them on the 10th November, 1798. They had the honor of being penned by the Author of the Declaration of American Independence.

Both these esteemed Productions are scarce, and out of print. They are frequently asked for. They are again wanting, to re-establish the land-marks of the Constitution; and to stay that flood of encroachment which threatens to sweep our Country. The Rights of the States and of the People, are again assailed in

an alarming manner. Doctrines are preached in high places, which are directly at war with the principles of our Government. The Centripetal power is assuming a new and fearful energy. Under the authority of great names, great errors are maintained. Is it not time, then, for the friends of Truth to rally together, and to re-assert her principles? Where can we find these principles more clearly stated, or the arguments in their defence more powerfully developed, than in the celebrated Productions which the Publisher of this Pamphlet now lays before his readers?

Richmond, (Va.) February, 1826.

VIRGINIA

HOUSE OF DELEGATES

REPORT

Of the Committee to whom were referred the Communications of various States, relative to the Resolutions of the last General Assembly of this State, concerning the Alien and Sedition Laws.

WHATEVER room might be found in the proceedings of some of the States, who have disapproved of the resolutions of the General Assembly of this Commonwealth, passed on the 21st day of December, 1798, for painful remarks on the spirit and manner of those proceedings, it appears to the Committee most consistent with the duty as well as dignity of the General Assembly, to hasten an oblivion of every circumstance which might be construed into a diminution of mutual respect, confidence and affection, among the members of the Union.

The Committee have deemed it a more useful task, to revise with a critical eye, the resolutions which have met with this disapprobation; to examine fully the several objections and arguments which have appeared against them; and to enquire whether there be any errors of fact, of principle, or of reasoning, which the candor of the General Assembly ought to acknowledge and correct.

The first of the resolutions is in the words following:

Resolved, That the General Assembly of Virginia doth unequivocally express a firm resolution to maintain and defend the Constitution of the United States, and the Constitution of this State, against every aggression, either foreign or domestic, and that they will support the Government of the United States in all measures warranted by the former.

No unfavorable comment can have been made on the sentiments here expressed. To maintain and defend the Constitution of the United States, and of their own State, against every aggression, both foreign and domestic, and to support the Government of the United States in all measures warranted by their Constitution, are duties which the General Assembly ought always to feel,

and to which, on such an occasion, it was evidently proper to express their sincere and firm adherence.

In their next resolution — *The General Assembly most solemnly declares a warm attachment to the Union of the States, to maintain which it pledges all its powers; and that, for this end, it is their duty to watch over and oppose every infraction of those principles, which constitute the only basis of that Union, because a faithful observance of them can alone secure its existence and the public happiness.*

The observation just made is equally applicable to this solemn declaration, of warm attachment to the Union, and this solemn pledge to maintain it; nor can any question arise among enlightened friends of the Union, as to the duty of watching over and opposing every infraction of those principles which constitute its basis, and a faithful observance of which can alone secure its existence, and the public happiness thereon depending.

The third resolution is in the words following:

That this Assembly doth explicitly and peremptorily declare, that it views the powers of the Federal Government, as resulting from the compact, to which the States are parties, as limited by the plain sense and intention of the instrument constituting that compact; as no further valid than they are authorised by the grants enumerated in that compact; and that, in case of a deliberate, palpable and dangerous exercise of other powers, not granted by the said compact, the States who are parties thereto, have the right, and are in duty bound, to interpose, for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.

On this resolution, the Committee have bestowed all the attention which its importance merits: They have scanned it not merely with a strict, but with a severe eye: and they feel confidence in pronouncing, that, in its just and fair construction, it is unexceptionably true in its several positions, as well as Constitutional and conclusive in its inferences.

The resolution declares, *first*, that "it views the powers of the Federal Government, as resulting from the compact to which the States are parties;" in other words, that the Federal powers are derived from the Constitution, and that the Constitution is a compact to which the States are parties.

Clear as the position must seem, that the Federal powers are derived from the Constitution, and from that alone, the Committee are not unapprised of a late doctrine, which opens another source of Federal powers, not less extensive and important, than it is new and unexpected. The examination of this doctrine will be most conveniently connected with a review of a succeeding resolution. The Committee satisfy themselves here with briefly remarking, that in all the cotemporary discussions and comments which the Constitution underwent, it was constantly justified and recommended, on the ground, that the powers not given to the Government, were withheld from it; and that, if any doubt could have existed on this subject, under the original text of the Constitution, it is removed, as far as words could remove it, by the 12th amendment, now a part of the Constitution, which expressly declares, "that the powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The other position involved in this branch of the resolution, namely, "that the States are parties to the Constitution or compact," is, in the judgment of the Committee, equally free from objection. It is indeed true, that the term "States," is sometimes used in a vague sense, and sometimes in different senses, according to the subject to which it is applied. Thus, it sometimes means the separate sections of territory occupied by the political societies within each; sometimes the particular Governments, established by those societies; sometimes those societies as organized into those particular Governments; and, lastly, it means the people composing those political societies, in their highest sovereign capacity. Although it might be wished that the perfection of language admitted less diversity in the signification of the same words, yet little inconveniency is produced by it, where the true sense can be collected with certainty from the different applications. In the present instance, whatever different constructions of the term "States," in the resolution, may have been entertained, all will at least concur in that last mentioned; because, in that sense, the Constitution was submitted to the "States:" in that sense the "States" ratified it: and, in that sense of the term "States," they are consequently parties to the compact, from which the powers of the Federal Government result.

The next position is, that the General Assembly views the

powers of the Federal Government, "as limited by the plain sense and intention of the instrument constituting that compact," and "as no farther valid than they are authorised by the grants therein enumerated." It does not seem possible, that any just objection can lie against either of these clauses. The first amounts merely to a declaration, that the compact ought to have the interpretation plainly intended by the parties to it; the other to a declaration, that it ought to have the execution and effect intended by them. If the powers granted, be valid, it is solely because they are granted: and, if the granted powers are valid, because granted, all other powers not granted, must not be valid.

The resolution, having taken this view of the Federal compact, proceeds to infer, "that, in case of a deliberate, palpable and dangerous exercise of other powers, not granted by the said compact, the States, who are parties thereto, have the right and are in duty bound to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them."

It appears to your Committee to be a plain principle, founded in common sense, illustrated by common practice, and essential to the nature of compacts; that, where resort can be had to no tribunal, superior to the authority of the parties, the parties themselves must be the rightful judges in the last resort, whether the bargain made has been pursued or violated. The Constitution of the United States was formed by the sanction of the States, given by each in its sovereign capacity. It adds to the stability and dignity, as well as to the authority of the Constitution, that it rests on this legitimate and solid foundation. The States, then, being the parties to the Constitutional compact, and in their sovereign capacity, it follows of necessity, that there can be no tribunal above their authority, to decide in the last resort, whether the compact made by them be violated; and, consequently, that, as the parties to it, they must themselves decide, in the last resort, such questions as may be of sufficient magnitude to require their interposition.

It does not follow, however, that because the States, as sovereign parties to their Constitutional compact, must ultimately decide whether it has been violated, that such a decision ought to be interposed, either in a hasty manner, or on doubtful and inferior occasions. Even in the case of ordinary Conventions be-

tween different nations, where, by the strict rule of interpretation, a breach of a part may be deemed a breach of the whole; every part being deemed a condition of every other part, and of the whole, it is always laid down that the breach must be both wilful and material to justify an application of the rule. But in the case of an intimate and Constitutional Union, like that of the United States, it is evident that the interposition of the parties, in their sovereign capacity, can be called for by occasions only, deeply and essentially effecting the vital principles of their political system.

The resolution has accordingly guarded against any misapprehension of its object, by expressly requiring for such an interposition, "the case of a *deliberate, palpable* and *dangerous* breach of the Constitution, by the exercise of *powers not granted* by it." It must be a case, not of a light and transient nature, but of a nature *dangerous* to the great purposes for which the Constitution was established. It must be a case, moreover, not obscure or doubtful in its construction, but plain and *palpable*. Lastly, it must be a case not resulting from a partial consideration, or hasty determination; but a case stampt with a final consideration and *deliberate* adherence. It is not necessary, because the resolution does not require, that the question should be discussed, how far the exercise of any particular power, ungranted by the Constitution, would justify the interposition of the parties to it. As cases might easily be states, which none would contend ought to fall within that description; cases, on the other hand, might, with equal ease, be stated, so flagrant and so fatal, as to unite every opinion in placing them within the description.

But the resolution has done more than guard against misconstruction, by expressly referring to cases of a *deliberate, palpable* and *dangerous* nature. It specifies the object of the interposition which it contemplates, to be solely that of arresting the progress of the *evil* of usurpation, and of maintaining the authorities, rights and liberties appertaining to the States, as parties to the Constitution.

From this view of the resolution, it would seem inconceivable that it can incur any just disapprobation from those, who laying aside all momentary impressions, and recollecting the genuine source and object of the Federal Constitution, shall candidly and accurately interpret the meaning of the General Assembly. If the

deliberate exercise of dangerous powers, palpably withheld by the Constitution, could not justify the parties to it, in interposing even so far as to arrest the progress of the evil, and thereby to preserve the Constitution itself, as well as to provide for the safety of the parties to it; there would be an end to all relief from usurped power, and a direct subversion of the rights specified or recognized under all the State Constitutions, as well as a plain denial of the fundamental principle on which our independence itself was declared.

But it is objected, that the Judicial authority is to be regarded as the sole expositor of the Constitution, in the last resort; and it may be asked for what reason, the declaration by the General Assembly, supposing it to be theoretically true, could be required at the present day and in so solemn a manner.

On this objection it might be observed, *first:* that there may be instances of usurped power, which the forms of the Constitution would never draw within the control of the Judicial department: *secondly,* that if the decision of the Judiciary be raised above the authority of the sovereign parties to the Constitution, the decisions of the other departments, not carried by the forms of the Constitution before the Judiciary, must be equally authoritative and final with the decisions of that department. But the proper answer to the objection is, that the resolution of the General Assembly relates to those great and extraordinary cases, in which all the forms of the Constitution may prove ineffectual against infractions dangerous to the essential rights of the parties to it. The resolution supposes that dangerous powers, not delegated, may not only be usurped and executed by the other departments, but that the Judicial department also may exercise or sanction dangerous powers beyond the grant of the Constitution; and consequently, that the ultimate right of the parties to the Constitution, to judge whether the compact has been dangerously violated, must extend to violations by one delegated authority, as well as by another; by the Judiciary, as well as by the Executive, or the Legislature.

However true, therefore, it may be that the Judicial department, is, in all questions submitted to it by the forms of the Constitution, to decide in the last resort, this resort must necessarily be deemed the last in relation to the authorities of the other departments of the Government; not in relation to the rights of

the parties to the Constitutional compact, from which the Judicial as well as the other departments hold their delegated trusts. On any other hypothesis, the delegation of Judicial power would annul the authority delegating it; and the concurrence of this department with the others in usurped powers, might subvert for ever, and beyond the possible reach of any rightful remedy, the very Constitution, which all were instituted to preserve.

The truth declared in the resolution being established, the expediency of making the declaration at the present day, may safely be left to the temperate consideration and candid judgment of the American public. It will be remembered, that a frequent recurrence to fundamental principles, is solemnly enjoined by most of the State Constitutions, and particularly by our own, as a necessary safeguard against the danger of degeneracy to which republics are liable, as well as other Governments, though in a less degree than others. And a fair comparison of the political doctrines not unfrequent at the present day, with those which characterized the epoch of our revolution, and which form the basis of our republican Constitutions, will best determine whether the declaratory recurrence here made to those principles, ought to be viewed as unseasonable and improper, or as a vigilant discharge of an important duty. The authority of Constitutions over Governments, and of the sovereignty of the people over Constitutions, are truths which are at all times necessary to be kept in mind; and at no time perhaps more necessary than at the present.

The *fourth* resolution stands as follows:

That the General Assembly doth also express its deep regret, that a spirit has in sundry instances, been manifested by the Federal Government, to enlarge its powers by forced constructions of the Constitutional charter which defines them; and that indications have appeared of a design to expound certain general phrases, (which, having been copied from the very limited grant of powers in the former articles of confederation, were the less liable to be misconstrued) so as to destroy the meaning and effect of the particular enumeration which necessarily explains, and limits the general phrases; and so as to consolidate the States by degrees, into one sovereignty, the obvious tendency and inevitable result of which would be, to transform the present

republican system of the United States, into an absolute, or at best a mixed monarchy.

The *first* question here to be considered is, whether a spirit has in sundry instances been manifested by the Federal Government to enlarge its powers by forced constructions of the Constitutional charter.

The General Assembly having declared their opinion merely by regretting in general terms that forced constructions for enlarging the Federal powers have taken place, it does not appear to the Committee necessary to go into a specification of every instance to which the resolution may allude. The Alien and Sedition Acts being particularly named in a succeeding resolution, are of course to be understood as included in the allusion. Omitting others which have less occupied public attention, or been less extensively regarded as unconstitutional, the resolution may be presumed to refer particularly to the Bank law, which from the circumstances of its passage, as well as the latitude of construction on which it is founded, strikes the attention with singular force; and the carriage tax, distinguished also by circumstances in its history having a similar tendency. Those instances alone, if resulting from forced construction and calculated to enlarge the powers of the Federal Government, as the Committee cannot but conceive to be the case, sufficiently warrant this part of the resolution. The Committee have not thought it incumbent on them to extend their attention to laws which have been objected to, rather as varying the Constitutional distribution of powers in the Federal Government, than as an absolute enlargement of them; because instances of this sort, however important in their principles and tendencies, do not appear to fall strictly within the text under review.

The other questions presenting themselves, are — 1. Whether indications have appeared of a design to expound certain general phrases copied from the "Articles of Confederation" so as to destroy the effect of the particular enumeration explaining and limiting their meaning. 2. Whether this exposition would by degrees consolidate the States into one sovereignty. 3. Whether the tendency and result of this consolidation would be to transform the republican system of the United States into a monarchy.

1. The general phrases here meant must be those "of providing for the common defence and general welfare."

In the "Articles of Confederation," the phrases are used as follows, in art. VII. "All charges of war, and all other expenses that shall be incurred *for the common defence and general welfare*, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to, or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated, according to such mode as the United States in Congress assembled, shall from time to time direct and appoint."

In the existing Constitution, they make the following part of Sec. 8. "The Congress shall have power, to lay and collect taxes, duties, imposts and excises to pay the debts, and provide for the common defence and general welfare of the United States."

This similarity in the use of these phrases in the two great Federal charters, might well be considered, as rendering their meaning less liable to be misconstrued in the latter; because it will scarcely be said, that in the former they were ever understood to be either a general grant of power, or to authorise the requisition or application of money by the old Congress to the common defence and general welfare, except in the cases afterwards enumerated, which explained and limited their meaning; and if such was the limited meaning attached to these phrases in the very instrument revised and re-modelled by the present Constitution, it can never be supposed that when copied into this Constitution, a different meaning ought to be attached to them.

That, notwithstanding this remarkable security against misconstruction, a design has been indicated to expound these phrases in the Constitution, so as to destroy the effect of the particular enumeration of powers by which it explains and limits them, must have fallen under the observation of those who have attended to the course of public transactions. Not to multiply proofs on this subject, it will suffice to refer to the Debates of the Federal Legislature, in which arguments have on different occasions been drawn, with apparent effect, from these phrases, in their indefinite meaning.

To these indications might be added, without looking farther, the official report on manufacturers, by the late Secretary of the Treasury, made on the 5th of December, 1791; and the report of a committee of Congress, in January, 1797, on the promotion of

Agriculture. In the first of these it is expressly contended to belong "to the discretion of the National Legislature to pro-"nounce upon the objects which concern the *general welfare*, and "for which, under that description, an appropriation of money is "requisite and proper. And there seems to be no room for a "doubt, that whatever concerns the general interests of LEARNING, "of AGRICULTURE, of MANUFACTURERS, and of COMMERCE, are "within the sphere of the National Councils, *as far as regards an* "*application of money*." The latter report assumes the same latitude of power in the National Councils, and applies it to the encouragement of Agriculture, by means of a society to be established at the seat of government. Although neither of these reports may have received the sanction of a law carrying it into effect; yet, on the other hand, the extraordinary doctrine contained in both, has passed without the slightest positive mark of disapprobation from the authority to which it was addressed.

Now, whether the phrases in question be construed to authorise every measure relating to the common defence and general welfare, as contended by some; or every measure only in which there might be an application of money, as suggested by the caution of others; the effect must substantially be the same, in destroying the import and force of the particular enumeration of powers which follow these general phrases in the Constitution. For, it is evident, that there is not a single power whatever, which may not have some reference to the common defence, or the general welfare; not a power of any magnitude, which, in its exercise, does not involve or admit an application of money. The Government, therefore, which possesses power in either one or other of these extents, is a Government without the limitations formed by a particular enumeration of powers; and consequently, the meaning and effect of this particular enumeration, is destroyed by the exposition given to these general phrases.

This conclusion will not be affected by an attempt to qualify the power over the "general welfare," by referring it to cases where the *general welfare* is beyond the reach of *separate* provisions by the *individual States;* and leaving to these their jurisdictions in cases, to which their separate provisions may be competent. For, as the authority of the individual States must in all cases be incompetent to general regulations operating through the whole, the authority of the United States would be

extended to every object relating to the general welfare, which might, by any possibility, be provided for by the general authority. This qualifying construction, therefore, would have little, if any tendency, to circumscribe the power claimed under the latitude of the terms "general welfare."

The true and fair construction of this expression, both in the original and existing Federal compacts, appears to the committee too obvious to be mistaken. In both, the Congress is authorised to provide money for the common defence and *general welfare*. In both, is subjoined to this authority, an enumeration of the cases, to which their powers shall extend. Money cannot be applied to the *general welfare*, otherwise than by an application of it to some *particular* measure, conducive to the general welfare. Whenever, therefore, money has been raised by the general authority, and is to be applied to a particular measure, a question arises, whether the particular measure be within the enumerated authorities vested in Congress. If it be, the money requisite for it, may be applied to it; if it be not, no such application can be made. This fair and obvious interpretation coincides with, and is enforced by, the clause in the Constitution, which delcares, that "no money shall be drawn from the Treasury, but in consequence of appropriations by law." An appropriation of money to the general welfare, would be deemed rather a mockery than an observance of this Constitutional injunction.

2. Whether the exposition of the general phrases here combatted, would not, by degrees, consolidate the States into one sovereignty, is a question, concerning which the committee can perceive little room for difference of opinion. To consolidate the States into one sovereignty, nothing more can be wanted, than to supersede their respective sovereignties in the cases reserved to them, by extending the sovereignty of the United States, to all cases of the "general welfare," that is to say, to *all cases whatever*.

3. That the obvious tendency and inevitable result of a consolidation of the States into one sovereignty, would be to transform the republican system of the United States into a monarchy, is a point which seems to have been sufficiently decided by the general sentiment of America. In almost every instance of discussion, relating to the consolidation in question, its certain tendency to pave the way to monarchy, seems not to have been contested. The prospect of such a consolidation, has formed the

only topic of controversy. It would be unnecessary, therefore, for the committee to dwell long on the reasons which support the position of the General Assembly. It may not be improper, however, to remark two consequences, evidently flowing from an extension of the Federal powers to every subject falling within the idea of the "general welfare."

One consequence must be, to enlarge the sphere of discretion allotted to the Executive Magistrate. Even within the Legislative limits properly defined by the Constitution, the difficulty of accommodating legal regulations to a country so great in extent, and so various in its circumstances, has been much felt; and has led to occasional investments of power in the Executive, which involve perhaps as large a portion of discretion, as can be deemed consistent with the nature of the Executive trust. In proportion as the objects of Legislative care might be multiplied, would the time allowed for each be diminished, and the difficulty of providing uniform and particular regulations for all, be increased. From these sources would necessarily ensue a greater latitude to the agency of that department which is always in existence, and which could best mould regulations of a general nature, so as to suit them to the diversity of particular situations. And it is in this latitude, as a supplement to the deficiency of the laws, that the degree of Executive prerogative materially consists.

The other consequence would be, that of an excessive augmentation of the offices, honors and emoluments depending on the Executive will. Add to the present legitimate stock, all those of every description which a consolidation of the States would take from them, and turn over to the Federal Government, and the patronage of the Executive would necessarily be as much swelled in this case, as its prerogative would be in the other.

This disproportionate increase of prerogative and patronage, must, evidently, either enable the Chief Magistrate of the Union, by quiet means, to secure his re-election from time to time, and finally, to regulate the succession as he might please: or, by giving so transcendant an importance to the office, would render the elections to it so violent and corrupt, that the public voice itself might call for an hereditary, in place of an elective succession. Whichever of these events might follow, the transformation of the republican system of the United States into a monarchy, anticipated by the General Assembly from a consolidation of the

States into one sovereignty, would be equally accomplished; and whether it would be into a mixed or an absolute monarchy, might depend on too many contingencies to admit to any certain foresight.

The resolution next in order, is contained in the following terms:

That the General Assembly doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the "Alien and Sedition Acts," passed at the last session of Congress; the first of which exercises a power no where delegated to the Federal Government; and which, by uniting Legislative and Judicial powers to those of Executive, subverts the general principles of a free government, as well as the particular organization and positive provisions of the Federal Constitution; and the other of which acts exercises, in like manner, a power not delegated by the Constitution; but, on the contrary, expressly and positively forbidden by one of the amendments thereto: a power, which, more than any other, ought to produce universal alarm; because it is levelled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.

The subject of this resolution having, it is presumed, more particularly led the General Assembly into the proceedings which they communicated to the other States, and being in itself of peculiar importance; it deserves the most critical and faithful investigation; for the length of which no other apology will be necessary.

The subject divides itself into *first*, "The Alien Act," *secondly*, "The Sedition Act."

Of the "Alien Act," it is affirmed by the Resolution, 1st. That it exercises a power no where delegated to the Federal Government. 2d. That it unites Legislative and Judicial powers to those of the Executive. 3d. That this union of power, subverts the general principles of free government. 4th. That it subverts the particular organization and positive provisions of the Federal Constitution.

In order to clear the way for a correct view of the first position, several observations will be premised.

In the first place; it is to be borne in mind, that it being a characteristic feature of the Federal Constitution, as it was originally ratified, and an amendment thereto having precisely declared, "That the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people;" it is incumbent in this, as in every other exercise of power by the Federal Government, to prove from the Constitution, that it grants the particular power exercised.

The next observation to be made, is, that much confusion and fallacy, have been thrown into the question, by blending the two cases of *aliens, members of a hostile nation;* and *aliens, members of friendly nations.* These two cases are so obviously, and so essentially distinct, that it occasions no little surprise that the distinction should have been disregarded: and the surprise is so much the greater, as it appears that the two cases are actually distinguished by two separate acts of Congress, passed at the same session, and comprised in the same publication; the one providing for the case of "alien enemies;" the other "concerning aliens" indiscriminately; and consequently extending to aliens of every nation in peace and amity with the United States. With respect to alien enemies, no doubt has been intimated as to the Federal authority over them; the Constitution having expressly delegated to Congress the power to declare war against any nation, and of course to treat it and all its members as enemies. With respect to aliens, who are not enemies, but members of nations in peace and amity with the United States, the power assumed by the act of Congress, is denied to be Constitutional; and it is accordingly against this act, that the protest of the General Assembly is expressly and exclusively directed.

A third observation is, that were it admitted, as is contended, that the "act concerning Aliens," has for its object, not a *penal,* but a *preventive* justive; it would still remain to be proved that it comes within the Constitutional power of the Federal Legislature; and if within its power, that the Legislature has exercised it in a Constitutional manner.

In the administration of preventive justice, the following principles have been held sacred; that some probable ground of suspicion be exhibited before some Judicial authority; that it be supported by oath or affirmation; that the party may avoid being

thrown into confinement, by finding pledges or sureties for his legal conduct sufficient in the judgment of some Judicial authority; that he may have the benefit of a writ of habeas corpus, and thus obtain his release, if wrongfully confined; and that he may at any time be discharged from his recognizance, or his confinement, and restored to his former liberty and rights, on the order of the proper Judicial authority, if it shall see sufficient cause.

All these principles of the only preventive justice known to American jurisprudence, are violated by the Alien act. The ground of suspicion is to be judged of, not by any Judicial authority, but by the Executive Magistrate alone: no oath or affirmation is required; if the suspicion be held reasonable by the President, he may order the suspected Alien to depart the territory of the United States, without the opportunity of avoiding the sentence, by finding pledges for his future good conduct; as the President may limit the time of departure as he pleases, the benefit of the writ of habeas corpus, may be suspended with respect to the party, although the Constitution ordains, that it shall not be suspended, unless when the public safety may require it in case of rebellion or invasion, neither of which existed at the passage of the act; and the party being, under the sentence of the President, either removed from the United States, or being punished by imprisonment, or disqualification ever to become a citizen on conviction of not obeying the order of removal, he cannot be discharged from the proceedings against him, and restored to the benefits of his former situation, although the *highest Judicial authority* should see the most sufficient cause for it.

But, in the last place, it can never be admitted, that the removal of Aliens, authorised by the act, is to be considered, not as punishment for an offence; but as a measure of precaution and prevention. If the banishment of an alien from a country into which he has been invited, as the asylum most auspicious to his happiness; a country, where he may have formed the most tender of connections, where he may have vested his entire property, and acquired property of the real and permanent, as well as the moveable and temporary kind; where he enjoys under the laws, a greater share of the blessings of personal security and personal liberty, than he can elsewhere hope for, and where he may have

nearly completed his probationary title to citizenship; if, moreover, in the execution of the sentence against him, he is to be exposed, not only to the ordinary dangers of the sea, but to the peculiar casualties incident to a crisis of war, and of unusual licentiousness on that element, and possibly to vindictive purposes which his emigration itself may have provoked; if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied. And if it be a punishment, it will remain to be enquired, whether it can be constitutionally inflicted, on mere suspicion, by the single will of the Executive Magistrate, on persons convicted of no personal offence against the laws of the land, nor involved in any offence against the law of nations, charged on the foreign state of which they are members.

One argument offered in justification of this power exercised over Aliens, is, that the admission of them into the country being of favor, not of right, the favor is at all times revocable.

To this argument it might be answered, that allowing the truth of the inference, it would be no proof of what is required. A question would still occur, whether the Constitution had vested the discretionary power of admitting Aliens, in the Federal Government or in the State Governments.

But it cannot be a true inference, that because the admission of an Alien is a favor, the favor may be revoked at pleasure. A grant of land to an individual, may be of favor, not of right; but the moment the grant is made, the favor becomes a right, and must be forfeited before it can be taken away. To pardon a malefactor may be a favor, but the pardon is not, on that account, the less irrevocable. To admit an Alien to naturalization, is as much a favor, as to admit him to reside in the country; yet it cannot be pretended, that a person naturalized can be deprived of the benefit, any more than a native citizen can be disfranchised.

Again, it is said, that Aliens not being parties to the Constitution, the rights and privileges which it secures, cannot be at all claimed by them.

To this reasoning also, it might be answered, that although Aliens are not parties to the Constitution, it does not follow that the Constitution has vested in Congress an absolute power over them. The parties to the Constitution may have granted, or

retained, or modified the power over Aliens, without regard to that particular consideration.

But a more direct reply is, that it does not follow, because Aliens are not parties to the Constitution, as citizens are parties to it, that whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws, than they are parties to the Constitution; yet, it will not be disputed, that as they owe on one hand, a temporary obedience, they are entitled in return to their protection and advantage.

If Aliens had no rights under the Constitution, they might not only be banished, but even capitally punished, without a jury or the other incidents to a fair trial. But so far has a contrary principle been carried, in every part of the United States, that except on charges of treason, an Alien has, besides all the common privileges, the special one of being tried by a jury, of which one half may be also Aliens.

It is said, further, that by the law and practice of nations, Aliens may be removed at discretion, for offences against the laws of nations; that Congress are authorised to define and punish such offences; and that to be dangerous to the peace of society is, in Aliens, one of those offences.

The distinction between Alien enemies and Alien friends, is a clear and conclusive answer to this argument. Alien enemies are under the law of nations, and liable to be punished for offences against it. Alien friends, except in the single case of public ministers, are under the municipal law, and must be tried and punished according to that law only.

This argument also, by referring the Alien act, to the power of Congress to define and *punish* offences against the law of nations, yields the point that the act is of a *penal*, not merely of a preventive operation. It must, in truth, be so considered. And if it be a penal act, the punishment it inflicts, must be justified by some offence that deserves it.

Offences for which Aliens, within the jurisdiction of a country, are punishable, are first, offences committed by the nation of which they make a part, and in whose offences they are involved: Secondly, offences committed by themselves alone, without any charge against the nation to which they belong. The first is the case of Alien enemies; the second, the case of Alien friends. In the first case, the offending nation can no otherwise be punished

than by war, one of the laws which authorises the expulsion of such of its members, as may be found within the country, against which the offence has been committed. In the second case, the offence being committed by the individual, not by his nation, and against the municipal law, not against the law of nations; the individual only, and not the nation, is punishable; and the punishment must be conducted according to the municipal law, not according to the law of nations. Under this view of the subject, the act of Congress, for the removal of Alien enemies, being conformable to the law of nations, is justified by the Constitution: and the "act," for the removal of Alien friends, being repugnant to the Constitutional principles of municipal law, is unjustifiable.

Nor is the act of Congress, for the removal of Alien friends, more agreeable to the general practice of nations, than it is within the purview of the law of nations. The general practice of nations, distinguishes between Alien friends and Alien enemies. The latter it has proceeded against, according to the law of nations, by expelling them as enemies. The former it has considered as under a local and temporary allegiance, and entitled to a correspondent protection. If contrary instances are to be found in barbarous countries, under undefined prerogatives, or amid revolutionary dangers; they will not be deemed fit precedents for the government of the United States, even, if not beyond its Constitutional authority.

It is said, that Congress may grant letters of marque and reprisal; that reprisals may be made on persons, as well as property; and that the removal of Aliens may be considered as the exercise in an inferior degree, of the general power of reprisal on persons.

Without entering minutely into a question that does not seem to require it; it may be remarked, that reprisal is a seizure of foreign persons or property, with a view to obtain that justice for injuries done by one State or its members, to another State or its members; for which, a refusal of the aggressor requires such a resort to force under the law of nations. It must be considered as an abuse of words to call the removal of persons from a country, a seizure or reprisal on them: nor is the distinction to be overlooked between reprisals on persons within the country and under the faith of its laws, and on persons out of the country. But, laying aside these considerations; it is evidently impossible to

bring the Alien act within the power of granting reprisals; since it does not alledge or imply any injury received from any particular nation, for which this proceeding against its members was intended as a reparation. The proceeding is authorised against Aliens *of every nation;* of nations charged neither with any similar proceeding against American citizens, nor with any injuries for which justice might be sought in the mode prescribed by the act. Were it true, therefore, that good causes existed for reprisals against one or more foreign nations, and that neither the persons nor property of its members, under the faith of our laws, could plead an exemption; the operation of the act ought to have been limited to the Aliens among us, belonging to such nations. To license reprisals against all nations, for aggressions charged on one only, would be a measure as contrary to every principle of justice and public law, as to a wise policy, and the universal practice of nations.

It is said, that the right of removing Aliens is an incident to the power of war, vested in Congress by the Constitution.

This is a former argument in a new shape only; and is answered by repeating, that the removal of Alien enemies is an incident to the power of war; that the removal of Alien friends, is not an incident to the power of war.

It is said, that Congress are by the Constitution to protect each State against invasion; and that the means of *preventing* invasion are included in the power of protection against it.

The power of war in general, having been before granted by the Constitution; this clause must either be a mere specification for greater caution and certainty, of which there are other examples in the instrument; or be the injunction of a duty, superadded to a grant of the power. Under either explanation, it cannot enlarge the powers of Congress on the subject. The power and the duty to protect each State against an invading enemy, would be the same under the general power, if this regard to greater caution had been omitted.

Invasion is an operation of war. To protect against invasion is an exercise of the power of war. A power, therefore, not incident to war, cannot be incident to a particular modification of war. And as the removal of alien friends, has appeared to be no incident to a general state of war, it cannot be incident to a partial state, or a particular modification of war.

Nor can it ever be granted, that a power to act on a case when it actually occurs, includes a power over all the means that may *tend to prevent* the occurrence of the case. Such a latitude of construction would render unavailing, every practicable definition of particular and limited powers. Under the idea of preventing war in general, as well as invasion in particular, not only an indiscriminate removal of all aliens might be enforced, but a thousand other things still more remote from the operations and precautions appurtenant to war, might take place. A bigotted or tyrannical nation might threaten us with war, unless certain religious or political regulations were adopted by us; yet it never could be inferred, if the regulations which would prevent war, were such as Congress had otherwise no power to make, that the power to make them would grow out of the purpose they were to answer. Congress have power to suppress insurrections, yet it would not be allowed to follow, that they might employ all the means tending to prevent them; of which a system of moral instruction for the ignorant, and of provident support for the poor, might be regarded as among the most efficacious.

One argument for the power of the General Government to remove aliens, would have been passed in silence, if it had appeared under any authority inferior to that of a report, made during the last session of Congress, to the House of Representatives by a Committee, and approved by the House. The doctrine on which this argument is founded, is of so new and so extraordinary a character, and strikes so radically at the political system of America, that it is proper to state it in the very words of the report.

"The act [concerning aliens,] is said to be unconstitutional, "be-"cause to remove aliens, is a direct breach of the Constitution, "which provides, by the 9th section, of the 1st article: that the "migration or importation of such persons as any of the States "shall think proper to admit, shall not be prohibited by the Con-"gress, prior to the year 1808."

Among the answers given to this objection to the constitutionality of the act, the following very remarkable one is extracted:

"Thirdly, that as the Constitution has *given to the States*, no "power to remove aliens, during the period of the limitation "under consideration, in the mean time, on the construction as-"sumed, there would be no authority in the country, empowered

"to send away dangerous aliens, which cannot be admitted."

The reasoning here used, would not in any view, be conclusive; because there are powers exercised by most other Governments, which, in the United States are withheld by the people, both from the General Government and from the State Governments. Of this sort are many of the powers prohibited by the declarations of right prefixed to the Constitutions, or by the clauses in the Constitutions, in the nature of such declarations. Nay, so far is the political system of the United States distinguishable from that of other countries, by the caution with which powers are delegated and defined; that in one very important case, even of commercial regulation and revenue, the power is absolutely locked up against the hands of both Governments. A tax on exports can be laid by no Constitutional authority whatever. Under a system thus peculiarly guarded, there could surely be no absurdity in sup posing, that alien friends, who if guilty of treasonable machinations may be punished, or if suspected on probable grounds, may be secured by pledges or imprisonment, in like manner with permanent citizens, were never meant to be subjected to banishment by any arbitrary and unusual process, either under the one Government or the other.

But, it is not the inconclusiveness of the general reasoning in this passage, which chiefly calls the attention to it. It is the principle assumed by it, that the powers held by the States, are given to them by the Constitution of the United States; and the inference from this principle, that the powers supposed to be necessary which are not so given to the State Governments, must reside in the Government of the United States.

The respect, which is felt for every portion of the constituted authorities, forbids some of the reflections which this singular paragraph might excite; and they are the more readily suppressed, as it may be presumed, with justice perhaps, as well as candour, that inadvertence may have had its share in the error. It would be an unjustifiable delicacy, nevertheless, to pass by so portentous a claim, proceeding from so high an authority, without a monitory notice of the fatal tendencies with which it would be pregnant.

Lastly, it is said, that a law on the same subject with the Alien Act, passed by this State originally in 1785, and re-enacted in 1792, is a proof that a summary removal of suspected aliens, was

not heretofore regarded by the Virginia Legislature, as liable to the objections now urged against such a measure.

This charge against Virginia vanishes before the simple remark, that the law of Virginia relates to "suspicious persons "being the subjects of any foreign power or state, who shall have "*made a declaration of war*, or actually *commenced* hostilities, or "from whom the President shall apprehend *hostile designs;*" whereas the act of Congress relates to Aliens, being the subjects of foreign powers and states, who have *neither declared war, nor commenced hostilities, nor from whom hostile designs are apprehended.*

II. It is next affirmed to the Alien Act, that it unites Legislative; Judicial, and Executive powers in the hands of the President.

However difficult it may be to mark, in every case, with clearness and certainty, the line which divides Legislative power, from the other departments of power; all will agree, that the powers referred to these departments may be so general and undefined, as to be of a Legislative, not of an Executive or Judicial nature; and may for that reason be unconstitutional. Details to a certain degree, are essential to the nature and character of a law; and on criminal subjects, it is proper, that details should leave as little as possible to the discretion of those who are to apply and to execute the law. If nothing more were required, in exercising a Legislative trust, than a general conveyance of authority, without laying down any precise rules, by which the authority conveyed, should be carried into effect; it would follow, that the whole power of legislation might be transferred by the Legislature from itself, and proclamations might become substitutes for laws. A delegation of power in this latitude, would not be denied to be a union of the different powers.

To determine, then, whether the appropriate powers of the distinct departments are united by the act authorising the Executive to remove Aliens, it must be enquired whether it contains such details, definitions and rules, as appertain to the true character of a law; especially, a law by which personal liberty is invaded, property deprived of its value to the owner, and life itself indirectly exposed to danger.

The Alien Act declares, "that it shall be lawful for the President to order all such Aliens as he shall *judge dangerous* to the peace and safety of the United States, or shall have reasonable

ground to *suspect*, are concerned in any treasonable, or *secret machinations*, against the government thereof, to depart," & c.

Could a power be well given in terms less definite, less particular, and less precise? To be *dangerous to the public safety;* to be *suspected of secret machinations* against the government: these can never be mistaken for legal rules or certain definitions. They leave every thing to the President. His will is the law.

But, it is not a Legislative power only that is given to the President. He is to stand in the place of the Judiciary also. His suspicion is the only evidence which is to convict: his order, the only judgment which is to be executed.

Thus, it is, the President whose will is to designate the offensive conduct; it is his will that is to ascertain the individuals on whom it is charged; and it is his will, that is to cause the sentence to be executed. It is rightly affirmed, therefore, that the act unites Legislative and Judicial powers to those of the Executive.

III. It is affirmed, that this union of power subverts the general principles of free government.

It has become an axiom in the science of government, that a separation of the Legislative, Executive, and Judicial department, is necessary to the preservation of public liberty. No where has this axiom been better understood in theory, or more carefully pursued in practice, than in the United States.

IV. It is affirmed that such a union of powers subverts the particular organization and positive provisions of the Federal Constitution.

According to the particular organization of the Constitution, its Legislative powers are vested in the Congress, its Executive powers in the President, and its Judicial powers in a supreme and inferior tribunals. The union of any two of these powers, and still more of all three, in any one of these departments, as has been shown to be done by the Alien Act, must consequently subvert the constitutional organization of them.

That positive provisions, in the Constitution, securing to individuals the benefits of fair trial, are also violated by the union of powers in the Alien Act, necessarily results from the two facts, that the act relates to Alien friends, and that Alien friends being under the municipal law only, are entitled to its protection.

The *second* object against which the resolution protests, is the Sedition Act.

Of this act it is affirmed. 1. That it exercises in like manner a power not delegated by the Constitution. 2. That the power, on the contrary, is expressly and positively forbidden by one of the amendments to the Constitution. 3. That this is a power, which more than any other ought to produce universal alarm; because it is levelled against that right of freely examining public characters and measures, and of free communication thereon, which has ever been justly deemed the only effectual guardian of every other right.

1. That it exercises a power not delegated by the Constitution.

Here again, it will be proper to recollect, that the Federal Government being composed of powers specifically granted with a reservation of all others to the States or to the People, the positive authority under which the Sedition Act could be passed must be produced by those who assert its constitutionality. In what part of the Constitution, then, is this authority to be found?

Several attempts have been made to answer this question, which will be examined in their order. The committee will begin with one, which has filled them with equal astonishment and apprehension; and which, they cannot but persuade themselves, must have the same effect on all, who will consider it with coolness and impartiality, and with a reverence for our Constitution, in the true character in which it issued from the sovereign authority of the people. The committee refer to the doctrine lately advanced as a sanction to the Sedition Act; "that the common or unwritten law," a law of vast extent and complexity, and embracing almost every possible subject of legislation, both civil and criminal, makes a part of the law of these States, in their united and national capacity.

The novelty, and in the judgment of the committee, the extravagance of this pretension, would have consigned it to the silence, in which they have passed by other arguments, which an extraordinary zeal for the act has drawn into the discussion: But, the auspices, under which this innovation presents itself, have constrained the committee to bestow on it an attention, which other considerations might have forbidden.

In executing the task, it may be of use, to look back to the colonial state of this country, prior to the revolution; to trace the effect of the revolution which converted the colonies into independent States; to enquire into the import of the articles of con-

federation, the first instrument by which the union of the States was regularly established; and finally, to consult the constitution of 1788, which is the oracle that must decide the important question.

In the state prior to the revolution, it is certain that the common law under different limitations, made a part of the colonial codes. But whether it be understood that the original colonists brought the law with them, or made it their law by adoption; it is equally certain, that it was the separate law of each colony within its respective limits, and was unknown to them, as a law pervading and operating through the whole, as one society.

It could not possibly be otherwise. The common law was not the same in any two of the colonies; in some, the modifications were materially and extensively different. There was no common Legislature, by which, a common will could be expressed in the form of a law; nor any common magistracy, by which such a law could be carried into practice. The will of each colony, alone and separately, had its organs for these purposes.

This stage of our political history, furnishes no foothold for the patrons of this new doctrine.

Did then the principle or operation of the great event which made the colonies independent States, imply or introduce the common law, as a law of the Union?

The fundamental principle of the revolution was, that the colonies were co-ordinate members with each other, and with Great Britain; of an empire, united by a common Executive sovereign, but not united by any common Legislative sovereign. The Legislative power was maintained to be as complete in each American Parliament, as in the British Parliament. And the royal prerogative was in force in each colony, by virtue of its acknowledging the King for its Executive Magistrate, as it was in Great Britain, by virtue of a like acknowledgment there. A denial of these principles by Great Britain, and the assertion of them by America, produced the revolution.

There was a time indeed, when an exception to the Legislative separation of the several component and co-equal parts of the empire, obtained a degree of acquiescence. The British Parliament was allowed to regulate the trade with foreign nations, and between the different parts of the empire. This was, however, mere practice without right, and contrary to the true theory of

the Constitution. The conveniency of some regulations, in both those cases, was apparent; and as there was no Legislature with power over the whole, nor any constitutional pre-eminence among the Legislatures of the several parts, it was natural for the Legislature of that particular part which was the eldest and the largest, to assume this function, and for the others to acquiesce in it. This tacit arrangement was the less criticised as the regulations established by the British Parliament operated in favor of that part of the empire which seemed to bear the principal share of the public burdens, and were regarded as an indemnification of its advances for the other parts. As long as this regulating power was confined to the two objects of conveniency and equity, it was not complained of, nor much enquired into. But, no sooner was it perverted to the selfish views of the party assuming it, than the injured parties began to feel and to reflect; and the moment the claim to a direct and indefinite power was ingrafted on the precedent of the regulating power, the whole charm was dissolved, and every eye opened to the usurpation. The assertion by G. B. of a power to make laws for the other members of the empire *in all cases whatsoever*, ended in the discovery, that she had a right to make laws for them *in no cases whatsoever*.

Such being the ground of our revolution, no support nor color can be drawn from it, for the doctrine that the common law is binding on these States as one society. The doctrine, on the contrary, is evidently repugnant to the fundamental principle of the revolution.

The articles of confederation, are the next source of information on this subject.

In the interval between the commencement of the revolution and the final ratification of these articles, the nature and extent of the Union was determined by the circumstances of the crisis, rather than by any accurate delineation of the general authority. It will not be alleged, that the "common law" could have had any legitimate birth as a law of the United States during that state of things. If it came as such into existence at all, the charter of confederation must have been its parent.

Here again, however, its pretensions are absolutely destitute of foundation. This instrument does not contain a sentence or syllable that can be tortured into a countenance of the idea, that the parties to it were, with respect to the objects of the common law,

to form one community. No such law is named or implied, or alluded to, as being in force, or as brought into force by that compact. No provision is made by which such a law could be carried into operation; whilst, on the other hand, every such inference or pretext is absolutely precluded by article 2d, which declares "that each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

Thus far it appears, that not a vestige of this extraordinary doctrine can be found in the origin or progress of American institutions. The evidence against it has, on the contrary, grown stronger at every step, till it has amounted to a formal and positive exclusion, by written articles of compact among the parties concerned.

Is this exclusion revoked, and the common law introduced as a national law, by the present Constitution of the United States? This is the final question to be examined.

It is readily admitted, that particular parts of the common law may have a sanction from the Constitution, so far as they are necessarily comprehended in the technical phrases which express the powers delegated to the government; and so far also, as such other parts may be adopted by Congress as necessary and proper for carrying into execution the powers expressly delegated. But, the question does not relate to either of these portions of the common law. It relates to the common law beyond these limitations.

The only part of the Constitution which seems to have been relied on in this case, is the 2d sect. of art. III. "The Judicial "power shall extend to all cases, *in law and equity*, arising *under* "*this Constitution*, the laws of the United States, and Treaties "made or which shall be made under their authority."

It has been asked what cases, distinct from those arising under the laws and treaties of the United States, can arise under the Constitution, other than those arising under the common law; and it is inferred, that the common law is accordingly adopted or recognized by the Constitution.

Never, perhaps, was so broad a construction applied to a text so clearly unsusceptible of it. If any color for the inference could be found, it must be in the impossibility of finding any other cases

in law and equity, within the provision of the Constitution, to satisfy the expression; and rather than resort to a construction affecting so essentially the whole character of the government, it would perhaps be more rational to consider the expression as a mere pleonasm or inadvertence. But, it is not necessary to decide on such a dilemma. The expression is fully satisfied, and its accuracy justified, by two descriptions of cases, to which the Judicial authority is extended, and neither of which implies that the common law is the law of the United States. One of these descriptions comprehends the cases growing out of the restrictions on the Legislative power of the States. For example, it is provided that "no State shall emit bills of credit," or "make any thing but gold and silver coin a tender in payment of debts." Should this prohibition be violated, and a suit *between citizens of the same State* be the consequence, this would be a case arising under the Constitution before the Judicial power of the United States. A second description comprehends suits between citizens and foreigners, or citizens of different States, to be decided according to the State or foreign laws; but submitted by the Constitution to the Judicial power of the United States; the Judicial power being, in several instances, extended beyond the Legislative power of the United States.

To this explanation of the text, the following observations may be added:

The expression, "cases in law and equity," is manifestly confined to cases of a civil nature; and would exclude cases of criminal jurisdiction. Criminal cases in law and equity would be a language unknown to the law.

The succeeding paragraph of the same section is in harmony with this construction. It is in these words: "In all cases affecting Ambassadors, other public Ministers, and Consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. *In all* the other cases [including cases in law and equity arising under the Constitution] the Supreme Court shall have *appellate* jurisdiction both as to law and *fact;* with such exceptions, and under such regulations, as Congress shall make."

This paragraph, by expressly giving an *appellate* jurisdiction, in cases of law and equity arising under the Constitution, to *fact*, as well as to law, clearly excludes criminal cases, where the trial

by jury is secured; because the fact, in such cases, is not a subject of appeal. And, although the appeal is liable to such *exceptions* and regulations as Congress may adopt, yet it is not to be supposed that an *exception of all* criminal cases could be contemplated; as well because a discretion in Congress to make or omit the exception would be improper, as because it would have been unnecessary. The exception could as easily have been made by the Constitution itself, as referred to the Congress.

Once more; the amendment last added to the Constitution, deserves attention, as throwing light on this subject. "The Judicial power of the United States shall not be construed to extend to any suit in *law* or *equity*, commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign power." As it will not be pretended that any criminal proceeding could take place against a State; the terms *law* or *equity*, must be understood as appropriate to *civil*, in exclusion of *criminal* cases.

From these considerations, it is evident, that this part of the Constitution, even if it could be applied at all, to the purpose for which it has been cited, would not include any cases whatever of a criminal nature; and consequently, would not authorise the inference from it, that the Judicial authority extends to *offences* against the common law, as offences arising under the Constitution.

It is further to be considered, that even if this part of the Constitution could be strained into an application to every common law case, criminal as well as civil, it could have no effect in justifying the Sedition Act; which is an exercise of Legislative, and not of Judicial power: and it is the Judicial power only, of which the extent is defined in this part of the Constitution.

There are two passages in the Constitution, in which a description of the law of the United States, is found. The first is contained in art. III. sec. 2, in the words following: "This Constitution, the laws of the United States, and treaties made, or which shall be made under their autority." The second is contained in the 2d paragraph of art. VI. as follows: "This Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." The first of these descriptions was meant as a guide to the

Judges of the United States; the second, as a guide to the Judges in the several States. Both of them consist of an enumeration, which was evidently meant to be precise and complete. If the common law had been understood to be a law of the United States, it is not possible to assign a satisfactory reason why it was not expressed in the enumeration.

In aid of these objections, the difficulties and confusion inseparable from a constructive introduction of the common law, would afford powerful reasons against it.

Is it to be the common law with, or without the British statutes?

If without the statutory amendments, the vices of the code would be insupportable!

If with these amendments, what period is to be fixed for limiting the British authority over our laws?

Is it to be the date of the eldest or the youngest of the Colonies?

Or are the dates to be thrown together, and a medium deduced?

Or is our independence to be taken for the date?

Is, again, regard to be had to the various changes in the common law made by the local codes of America?

Is regard to be had to such changes, subsequent, as well as prior, to the establishment of the Constitution?

Is regard to be had to future, as well as past changes?

Is the law to be different in every State, as differently modified by its code; or are the modifications of any particular State, to be applied to all?

And on the latter supposition, which among the States codes would form the standard?

Questions of this sort might be multiplied with as much ease, as there would be difficulty in answering them.

The consequences flowing from the proposed construction, furnish other objections equally conclusive; unless the text were peremptory in its meaning, and consistent with other parts of the instrument.

These consequences may be in relation to the Legislative authority of the United States; to the Executive authority; to the Judicial authority; and to the Governments of the several States.

If it be understood, that the common law is established by the Constitution, it follows that no part of the law can be altered by

the Legislature; such of the statutes, already passed, as may be repugnant thereto, would be nullified; particularly the "Sedition Act" itself, which boasts of being a melioration of the common law; and the whole code, with all its incongruities, barbarisms, and bloody maxims, would be inviolably saddled on the good people of the United States.

Should this consequence be rejected, and the common law be held, like other laws, liable to revision and alteration, by the authority of Congress; it then follows, that the authority of Congress is co-extensive with the objects of common law; that is to say, with every object of Legislation: For, to every such object, does some branch or other of the common law extend. The authority of Congress would, therefore, be no longer under the limitations, marked out in the Constitution. They would be authorized to legislate in all cases whatsoever.

In the next place, as the President possesses the executive powers of the Constitution, and is to see that the laws be faithfully executed, his authority also must be co-extensive with every branch of the common law. The additions which this would make to his power, though not readily to be estimated, claim the most serious attention.

This is not all; it will merit the most profound consideration, how far an indefinite admission of the common law, with a latitude in construing it, equal to the construction by which it is deduced from the Constitution, might draw after it the various prerogatives making part of the unwritten law of England. The English Constitution itself is nothing more than a composition of unwritten laws and maxims.

In the third place, whether the common law be admitted as of legal or of Constitutional obligation, it would confer on the Judicial department a discretion little short of a Legislative power.

On the supposition of its having a Constitutional obligation, this power in the Judges would be permanent and irremediable by the Legislature. On the other supposition, the power would not expire, until the Legislature should have introduced a full system of statutory provisions. Let it be observed, too, that besides all the uncertainties above enumerated, and which present an immense field for judicial discretion, it would remain with the same department to decide what parts of the common law would,

and what would not, be properly applicable to the circumstances of the United States.

A discretion of this sort has always been lamented as incongruous and dangerous, even in the Colonial and State courts; although so much narrowed by positive provisions in the local codes on all the principal subjects embraced by the common law. Under the United States, where so few laws exist on those subjects, and where so great a lapse of time must happen before the vast chasm could be supplied, it is manifest that the power of the Judges over the law would, in fact, erect them into Legislators; and, that for a long time, it would be impossible for the citizens to conjecture, either what was, or would be law.

In the last place, the consequence of admitting the common law as the law of the United States, on the authority of the individual States, is as obvious as it would be fatal. As this law relates to every subject of Legislation, and would be paramount to the Constitutions and laws of the States; the admission of it would overwhelm the residuary sovereignty of the States, and by one constructive operation, new-model the whole political fabric of the country.

From the re-view thus taken of the situation of the American colonies prior to their Independence; of the effect of this event on their situation; of the nature and import of the articles of confederation; of the true meaning of the passage in the existing Constitution from which the common law has been deduced; of the difficulties and uncertainties incident to the doctrine; and of its vast consequences in extending the powers of the Federal Government, and in superseding the authorities of the State Governments; the committee feel the utmost confidence in concluding, that the common law never was, nor by any fair construction, ever can be, deemed a law for the American people as one community; and they indulge the strongest expectation that the same conclusion will finally be drawn, by all candid and accurate enquirers into the subject. It is indeed distressing to reflect, that it ever should have been made a question, whether the Constitution, on the whole face of which is seen so much labor to enumerate and define the several objects of Federal power, could intend to introduce in the lump, in an indirect manner, and by a forced construction of a few phrases, the vast and multifarious jurisdiction involved in the common law; a law

filling so many ample volumes; a law overspreading the entire field of Legislation; and a law that would sap the foundation of the Constitution as a system of limited and specified powers. A severer reproach could not in the opinion of the committee be thrown on the Constitution, on those who framed, or on those who established it, than such a supposition would throw on them.

The argument, then, drawn from the common law, on the ground of its being adopted or recognised by the Constitution, being inapplicable to the Sedition Act, the committee will proceed to examine the other arguments which have been founded on the Constitution.

They will waste but little time on the attempt to cover the act by the preamble to the Constitution; it being contrary to every acknowledged rule of construction, to set up this part of an instrument, in opposition to the plain meaning, expressed in the body of the instrument. A preamble usually contains the general motives or reasons, for the particular regulations or measures which follow it; and is always understood to be explained and limited by them. In the present instance, a contrary interpretation would have the inadmissible effect, of rendering nugatory or improper, every part of the Constitution which succeeds the preamble.

The paragraph in Art. 1, Sec. 8, which contains the power to lay and collect taxes, duties, imposts, and excises; to pay the debts, and provide for the common defence and general welfare, having been already examined, will also require no particular attention in this place. It will have been seen that in its fair and consistent meaning, it cannot enlarge the enumerated powers vested in Congress.

The part of the Constitution which seems most to be recurred to, in defence to the "Sedition Act," is the last clause of the above section, empowering Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

The plain import of this clause is, that Congress shall have all the incidental or instrumental powers necessary and proper for carrying into execution all the express powers; whether they be

vested in the Government of the United States, more collectively, or in the several departments, or officers thereof. It is not a grant of new powers to Congress, but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution, those otherwise granted, are included in the grant.

Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is, whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next enquiry must be, whether it is properly an incident to an express power, and necessary to its execution. If it be, it may be exercised by Congress. If it be not, Congress cannot exercise it.

Let the question be asked, then, whether the power over the press exercised in the "Sedition Act," be found among the powers expressly vested in the Congress? This is not pretended.

Is there any express power, for executing which it is a necessary and proper power?

The power which has been selected, as least remote, in answer to this question, is that of "suppressing insurrections;" which is said to imply a power to *prevent* insurrections, by punishing whatever may lead or *tend* to them. But, it surely cannot, with the least plausibility, be said, that a regulation of the press, and a punishment of libels, are exercises of a power to suppress insurrections. The most that could be said, would be, that the punishment of libels, if it had the tendency ascribed to it, might prevent the occasion of passing or executing laws necessary and proper for the suppression of insurrections.

Has the Federal Government no power, then, to prevent as well as to punish resistance to the laws?

They have the power, which the Constitution deemed most proper, in their hands for the purpose. The Congress has power, before it happens, to pass laws for punishing it: and the Executive and Judiciary have power to enforce those laws when it does happen.

It must be recollected by many, and could be shown to the satisfaction of all, that the construction here put on the terms "necessary and proper," is precisely the construction which prevailed during the discussions and ratifications of the Constitution. It may be added, and cannot too often be repeated, that it is a construction absolutely necessary to maintain their

consistency with the peculiar character of the government, as possessed of particular and defined powers only; not of the general and indefinite powers vested in ordinary governments. For, if the power to *suppress insurrections*, includes a power to *punish libels;* or if the power to *punish*, includes a power to *prevent*, by all the means that may have that *tendency;* such is the relation and influence among the most remote subjects of legislations, that a power over a very few, would carry with it a power over all. And it must be wholly immaterial, whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution, limited powers.

This branch of the subject will be closed with a reflection which must have weight with all; but more especially with those who place peculiar reliance on the judicial exposition of the Constitution, as the bulwark provided against undue extensions of the legislative power. If it be understood that the powers implied in the specified powers, have an immediate and appropriate relation to them, as means, necessary and proper for carrying them into execution, questions on the constitutionality of laws passed for this purpose, will be of a nature sufficiently precise and determinate for judicial cognizance and control! If, on the other hand, Congress are not limited in the choice of means by any such appropriate relation of them to the specified powers; but may employ all such means as they may deem fitted to *prevent*, as well as to *punish*, crimes subjected to their authority; such as may have a *tendency* only to *promote* an object for which they are authorised to provide; every one must perceive, that questions relating to means of this sort, must be questions of mere policy and expediency; on which, legislative discretion alone can decide, and from which the judicial interposition and controul are completely excluded.

2. The next point which the resolution requires to be provided, is, that the power over the press exercised by the Sedition Act, is positively forbidden by one of the amendments to the Constitution.

The amendment stands in these words — "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, *or abridging the freedom of speech or of the press;* or the right of the people peaceably to

assemble, and to petition the government for a redress of grievances."

In the attempts to vindicate the "Sedition Act," it has been contended. 1. That the "freedom of the press" is to be determined by the meaning of these terms in the common law. 2. That the article supposes the power over the press to be in Congress, and prohibits them only from *abridging* the freedom allowed to it by the common law.

Although it will be shewn, in examining the second of these positions, that the amendment is a denial to Congress of all power over the press, it may not be useless to make the following observations on the first of them.

It is deemed to be a sound opinion, that the Sedition Act, in its definition of some of the crimes created, is an abridgment of the freedom of publication, recognised by principles of the common law in England.

The freedom of the press under the common law, is, in the defences of the Sedition Act, made to consist in an exemption from all *previous* restraint on printed publications, by persons authorised to inspect and prohibit them. It appears to the Committee, that this idea of the freedom of the press, can never be admitted to be the American idea of it: since a law inflicting penalties on printed publications, would have a similar effect with a law authorising a previous restraint on them. It would seem a mockery to say, that no law should be passed, preventing publications from being made, but that laws might be passed for punishing them in case they should be made.

The essential difference between the British Government, and the American Constitutions, will place this subject in the clearest light.

In the British Government, the danger of encroachments on the rights of the People, is understood to be confined to the Executive Magistrate. The representatives of the People in the Legislature, are not only exempt themselves, from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger from the Executive. Hence it is a principle, that the Parliament is unlimited in its power; or, in their own language, is omnipotent. Hence too, all the ramparts for protecting the rights of the People, such as their Magna Charta, their Bill of Rights, &c. are not reared against the Parlia-

ment, but against the royal prerogative. They are merely Legislative precautions, against Executive usurpations. Under such a Government as this, an exemption of the press from previous restraint by licensers appointed by the King, is all the freedom that can be secured to it.

In the United States, the case is altogether different. The People, not the Government, possess the absolute sovereignty. The Legislature, no less than the Executive, is under limitations of power. Encroachments are regarded as possible from the one, as well as from the other. Hence in the United States, the great and essential rights of the People are secured against Legislative, as well as against Executive ambition. They are secured, not by laws paramount to prerogative; but by Constitutions paramount to laws. This security of the freedom of the press requires, that it should be exempt, not only from previous restraint by the Executive, as in Great Britain; but from Legislative restraint also; and this exemption, to be effectual, must be an exemption, not only from the previous inspection of licensers, but from the subsequent penalty of laws.

The state of the press, therefore, under the common law, cannot in this point of view, be the standard of its freedom in the United States.

But there is another view, under which it may be necessary to consider this subject. It may be alledged, that although the security for the freedom of the press, be different in Great Britain and in this country; being a legal security only in the former, and a constitutional security in the latter; and although there may be a further difference, in an extension of the freedom of the press, here, beyond an exemption from previous restraint, to an exemption from subsequent penalties also; yet that the actual legal freedom of the press, under the common law, must determine the degree of freedom, which is meant by the terms, and which is constitutionally secured against both previous and subsequent restraints.

The Committee are not unaware of the difficulty of all general questions, which may turn on the proper boundary between the liberty and licentiousness of the press. They will leave it therefore for consideration only, how far the difference between the nature of the British Government, and the nature of the American Governments, and the practice under the latter, may show the

degree of rigor in the former, to be inapplicable to, and not obligatory in the latter.

The nature of Governments elective, limited and responsible, in all their branches, may well be supposed to require a greater freedom of animadversion, than might be tolerated by the genius of such a Government as that of Great Britain. In the latter, it is a maxim, that the King, an hereditary, not a responsible magistrate, can do no wrong; and that the Legislature, which in two thirds of its composition, is also hereditary, not responsible, can do what it pleases. In the United States, the Executive magistrates are not held to be infallible, nor the Legislatures to be omnipotent; and both being elective, are both responsible. It is not natural and necessary, under such different circumstances, that a different degree of freedom, in the use of the press, should be contemplated?

Is not such an inference favored by what is observable in Great Britain itself? Notwithstanding the general doctrine of the common law, on the subject of the press, and the occasional punishment of those, who use it with a freedom offensive to the Government; it is well known, that with respect to the responsible members of the Government, where the reasons operating here, become applicable there, the freedom exercised by the press, and protected by the public opinion, far exceeds the limits prescribed by the ordinary rules of law. The ministry, who are responsible to impeachment, are at all times, animadverted on, by the press, with peculiar freedom; and during the elections for the House of Commons, the other responsible part of the Government, the press is employed with as little reserve towards the candidates.

The practice in America must be entitled to much more respect. In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing, the freedom of the press has stood; on this footing it yet stands. And it will not be a breach, either of truth or of candor, to say, that no persons or presses are in the habit of more unrestrained animadversions on the proceedings and functionaries of the State Governments, than the persons and presses most zealous in vindicating the act of Congress for punishing similar animadversions on the Government of the United States.

The last remark will not be understood, as claiming for the State Governments, as immunity greater than they have heretofore enjoyed. Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true, than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches, to their luxuriant growth, than by pruning them away, to injure the vigor of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect, that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity, over error and oppression; who reflect, that to the same beneficent source, the United States owe much of the lights which conducted them to the rank of a free and independent nation; and which have improved their political system, into a shape as suspicious to their happiness. Had "Sedition Acts," forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press; might not the United States have been languishing at this day, under the infirmities of a sickly confederation? Might they not possibly be miserable colonies, groaning under a foreign yoke?

To these observations, one fact will be added, which demonstrates that the common law cannot be admitted as the *universal* expositor of American terms, which may be the same with those contained in that law. The freedom of conscience, and of religion, are found in the same instruments, which assert the freedom of the press. It will never be admitted, that the meaning of the former, in the common law of England, is to limit their meaning in the United States.

Whatever weight may be allowed to these considerations, the Committee do not, however, by any means intend to rest the question on them. They contend that the article of amendment, instead of supposing in Congress a power that might be exercised over the press, provided its freedom was not abridged, was meant as a positive denial to Congress, of any power whatever on the subject.

To demonstrate that this was the true object of the article, it will be sufficient to recall the circumstances which led to it, and to

refer to the explanation accompanying the article.

When the Constitution was under the discussions which preceded its ratification, it is well known, that great apprehensions were expressed by many, lest the omission of some positive exception from the powers delegated, of certain rights, and of the freedom of the press particularly, might expose them to the danger of being drawn by construction within some of the powers vested in Congress; more especially of the power to make all laws necessary and proper for carrying their other powers into execution. In reply to this objection, it was invariably urged to be a fundamental and characteristic principle of the Constitution, that all powers not given by it, were reserved; that no powers were given beyond those enumerated in the Constitution, and such as were fairly incident to them; that the power over the rights in question, and particularly over the press, was neither among the enumerated powers, nor incident to any of them; and consequently that an exercise of any such power, would be a manifest usurpation. It is painful to remark, how much the arguments now employed in behalf of the Sedition Act, are at variance with the reasoning which then justified the Constitution, and invited its ratification.

From this posture of the subject, resulted the interesting question in so many of the conventions, whether the doubts and dangers ascribed to the Constitution, should be removed by any amendments previous to the ratification, or be postponed, in confidence that as far as they might be proper, they would be introduced in the form provided by the Constitution. The latter course was adopted; and in most of the States, the ratifications were followed by propositions and instructions for rendering the Constitution more explicit, and more safe to the rights, not meant to be delegated by it. Among those rights, the freedom of the press, in most instances, is particularly and emphatically mentioned. The firm and very pointed manner, in which it is asserted in the proceedings of the Convention of this State, will be hereafter seen.

In pursuance of the wishes thus expressed, the first Congress that assembled under the Constitution, proposed certain amendments, which have since, by the necessary ratifications, been made a part of it; among which amendments, is the article containing, among other prohibitions on the Congress, an express

declaration that they should make no law abridging the freedom of the press.

Without tracing farther the evidence on this subject, it would seem scarcely possible to doubt, that no power whatever over the press, was supposed to be delegated by the Constitution, as it originally stood; and that the amendment was intended as a positive and absolute reservation of it.

But the evidence is still stronger. The propositions of amendments made by Congress, is introduced in the following terms: "*The Conventions of a number of the States having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstructions or abuse of its powers, that further declaratory and restrictive clauses should be added; and as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institutions.*"

Here is the most satisfactory and authentic proof, that the several amendments proposed, were to be considered as either declaratory or restrictive; and whether the one or the other, as corresponding with the desire expressed by a number of the States, and as extending the ground of public confidence in the Government.

Under any other construction of the amendment relating to the press, than that it declared the press to be wholly exempt from the power of Congress, the amendment could neither be said to correspond with the desire expressed by a number of the States, nor be calculated to extend the ground of public confidence in the Government.

Nay more; the construction employed to justify the "Sedition Act," would exhibit a phenomenon, without a parallel in the political world. It would exhibit a number of respectable States, as denying first that any power over the press was delegated by the Constitution; as proposing next, that an amendment to it, should explicitly declare that no such power was delegated; and finally, as concurring in an amendment actually recognizing or delegating such a power.

Is then the Federal Government, it will be asked, destitute of every authority for restraining the licentiousness of the press, and for shielding itself against the libellous attacks which may be made on those who administer it?

The Constitution alone can answer this question. If no such power be expressly delegated, and it be not both necessary and

proper to carry into execution an express power; above all, if it be expressly forbidden by a declaratory amendment to the Constitution, the answer must be, that the Federal Government is destitute of all such authority.

And might it not be asked in turn, whether it is not more probable, under all the circumstances which have been reviewed, that the authority should be withheld by the Constitution, than that it should be left to a vague and violent construction; whilst so much pains were bestowed in enumerating other powers, and so many less important powers are included in the enumeration?

Might it not be likewise asked, whether the anxious circumspection which dictated so many *peculiar* limitations on the general authority, would be unlikely to exempt the press altogether from that authority? The peculiar magnitude of some of the powers necessarily committed to the Federal Government; the peculiar duration required for the functions of some of its departments; the peculiar distance of the seat of its proceedings from the great body of its constituents; and the peculiar difficulty of circulating an adequate knowledge of them through any other channel; will not these considerations, some or other of which produced other exceptions from the powers of ordinary Governments, all together, account for the policy of binding the hand of the Federal Government, from touching the channel which alone can give efficacy to its responsibility to its constituents; and of leaving those who administer it, to a remedy for their injured reputations, under the same laws, and in the same tribunals, which protect their lies, their liberties, and their properties?

But the question does not turn either on the wisdom of the Constitution, or on the policy which gave rise to its particular organization. It turns on the actual meaning of the instrument; by which it has appeared, that a power over the press is clearly excluded, from the number of powers delegated to the Federal Government.

3. And in the opinion of the Committee, well may it be said, as the resolution concludes with saying, that the unconstitutional power exercised over the press by the "Sedition Act," ought "more than any other, to produce universal alarm; because it is "levelled against that right of freely examining public characters "and measures, and of free communication among the people "thereon, which has ever been justly deemed the only effectual "guardian of every other right."

Without scrutinizing minutely into all the provisions of the "Sedition Act," it will be sufficient to cite so much of section 2, as follows: "And be it further enacted, that if any person shall write, "print, utter or publish, or shall cause or procure to be written, "printed, uttered or published, or shall knowingly and willingly "assist or aid in writing, printing, uttering or publishing any false, "scandalous and malicious writing or writings against the "Government of the United States, or either House of the Con-"gress of the United States, or the President of the United States, "*with an intent to defame the said Government, or either House* "*of the said Congress, or the President, or to bring them, or either* "*of them, into contempt or disrepute; or to excite against them or* "*either, or any of them, the hatred of the good people of the* "*United States, &c. Then such person being thereon convicted* "*before any Court of the United States, having jurisdiction* "*thereof, shall be punished by a fine not exceeding two thousand* "*dollars, and by imprisonment not exceeding two years.*"

On this part of the act, the following observations present themselves:

1. The Constitution supposes that the President, the Congress, and each of its Houses, may not discharge their trusts, either from defect of judgment, or other causes. Hence, they are all made responsible to their constituents, at the returning periods of election; and the President, who is singly entrusted with very great powers, is, as a further guard, subjected to an intermediate impeachment.

2. Should it happen, as the Constitution supposes it may happen, that either of these branches of the Government may not have duly discharged its trust; it is natural and proper, that according to the cause and degree of their faults, they should be brought into contempt or disrepute, and incur the hatred of the people.

3. Whether it has, in any case, happened that the proceedings of either, or all of those branches, evinces such a violation of duty as to justify a contempt, a disrepute or hatred among the people, can only be determined by a free examination thereof, and a free communication among the people thereon.

4. Whenever it may have actually happened, that proceedings of this sort are chargeable on all or either of the branches of the Government, it is the duty as well as right of intelligent and faithful citizens, to discuss and promulge them freely, as well to

controul them by the censorship of the public opinion, as to promote a remedy according to the rules of the Constitution. And it cannot be avoided, that those who are to apply the remedy must feel, in some degree, a contempt or hatred against the transgressing party.

5. As the act was passed on July 14, 1798, and is to be in force until March 3, 1801, it was of course, that during its continuance, two elections of the entire House of Representatives, an election of a part of the Senate, and an election of a President, were to take place.

6. That consequently, during all these elections, intended by the Constitution to preserve the purity, or to purge the faults of the administration, the great remedial rights of the people were to be exercised, and the responsibility of their public agents to be skreened, under the penalties of this act.

May it not be asked of every intelligent friend to the liberties of his country, whether the power exercised in such an act as this, ought not to produce great and universal alarm? Whether a rigid execution of such an act, in time past, would not have repressed that information and communication among the people, which is indispensable to the just exercise of their electoral rights? And whether such an act, if made perpetual, and enforced with rigor, would not, in time to come, either destroy our free system of Government, or prepare a convulsion that might prove equally fatal to it?

In answer to such questions, it has been pleased that the writings and publications forbidden by the act, are those only which are false and malicious, and intended to defame; and merit is claimed for the privilege allowed to authors to justify, by proving the truth of their publications, and for the limitations to which the sentence of fine and imprisonment is subjected.

To those who concurred in the act, under the extraordinary belief, that the option lay between the passing of such an act, and leaving in force the common law of libels, which punishes truth equally with falsehood; and submits the fine and imprisonment to the indefinite discretion of the court, the merit of good intentions ought surely not to be refused. A like merit may perhaps be due for the discontinuance of the *corporal punishment*, which the common law also leaves to the discretion of the court. This merit of *intention*, however, would have been greater, if the several mitigations had not been limited to so short a period: and

the apparent inconsistency would have been avoided, between justifying the act at one time, by contrasting it with the rigors of the common law, otherwise in force; and at another time by appealing to the nature of the crisis, as requiring the temporary rigor exerted by the act.

But, whatever may have been the meritorious intentions of all or any who contributed to the Sedition Act; a very few reflections will prove, that its baneful tendency is little diminished by the privilege of giving in evidence the truth of the matter contained in political writings.

In the first place, where simple and naked facts alone are in question, there is sufficient difficulty in some cases, and sufficient trouble and vexation in all, of meeting a prosecution from the government, with the full and formal proof, necessary in a Court of law.

But, in the next place, it must be obvious to the plainest minds, that opinions, and inferences, and conjectural observations, are not only in many cases inseparable from the facts, but may often be more the objects of the prosecution than the facts themselves; or may even be altogether abstracted from particular facts; and that opinions and inferences, and conjectural observations, cannot be subjects of that kind of proof which appertains to facts, before a Court of law.

Again: It is no less obvious, that the *intent* to defame or bring into contempt or disrepute, or hatred, which is made a condition of the offence created by the act, cannot prevent its pernicious influence, on the freedom of the press. For, omitting the enquiry, how far the malice of the intent is an inference of the law from the mere publication; it is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures: because those who engage in such discussions, must expect and *intend* to excite these unfavorable sentiments, so far as they may be thought to be deserved. To prohibit, therefore, the intent to excite those unfavorable sentiments against those who administer the government, is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them, is equivalent to a prohibition of discussions having that tendency and effect; which, again, is equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred

of the people, against being exposed to it, by free animadversions on their characters and conduct. Nor can there be a doubt, if those in public trust be shielded by penal laws from such strictures of the press, as may expose them to contempt or disrepute, or hatred, where they may deserve it, that in exact proportion as they may deserve to be exposed, will be the certainty and criminality of the intent to expose them and the vigilance of prosecuting and punishing it; nor a doubt, that a government thus intrenched in penal statutes, against the just and natural effects of a culpable administration, will easily evade the responsibility, which is essential to a faithful discharge of its duty.

Let it be recollected, lastly, that the right of electing the members of the government, constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right, depends on the knowledge of the comparative merits and demerits of the candidates for public trust; and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively. It has been seen, that a number of important elections will take place whilst the act is in force; although it should not be continued beyond the term to which it is limited. Should there happen, then, as is extremely probable in relation to some or other of the branches of the government, to be competitions between those who are, and those who are not, members of the government; what will be the situations of the competitors? Not equal; because the characters of the former will be covered by the "Sedition Act" from animadversions exposing them to disrepute among the people; whilst the latter may be exposed to the contempt and hatred of the people, without a violation of the act. What will be the situation of the people? Not free; because they will be compelled to make their election between competitors, whose pretensions they are not permitted by the act, equally to examine, to discuss, and to ascertain. And from both these situations, will not those in power derive an undue advantage for continuing themselves in it; which by impairing the right of election, endangers the blessings of the government founded on it?

It is with justice, therefore, that the General Assembly have affirmed in the resolution, as well that the right of freely examining public characters and measures, and of free communication thereon, is the only effectual guardian of every other right; as that

this particular right is levelled at, by the power exercised in the "Sedition Act."

The resolution next in order is as follows:

That this State having by its Convention, which ratified the Federal Constitution, expressly declared, that among other essential rights, "the liberty of conscience and of the press cannot be cancelled, abridged, restrained or modified by any authority of the United States," and from its extreme anxiety to guard these rights from every possible attack of sophistry and ambition, having with other States, recommended an amendment for that purpose, which amendment was, in due time, annexed to the Constitution; it would mark a reproachful inconsistency, and criminal degeneracy, if an indifference were now shewn, to the most palpable violation of one of the rights, thus declared and secured; and to the establishment of a precedent, which may be fatal to the other.

To place this resolution in its just light, it will be necessary to recur to the act of ratification by Virginia, which stands in the ensuing form:

We, the delegates of the people of Virginia, duly elected in pursuance of a recommendation from the General Assembly, and now met in Convention, having fully and freely investigated and discussed the proceedings of the Federal Convention, and being prepared as well as the most mature deliberation hath enabled us, to decide thereon; DO, in the name and in behalf of the people of Virginia, declare and make known, that the powers granted under the Constitution, being derived from the people of the United States, may be resumed by them, whensoever the same shall be perverted to their injury or oppression; and that every power not granted thereby, remains with them, and at their will. That therefore, no right of any denomination can be cancelled, abridged, restrained or modified, by the Congress, by the Senate or House of Representatives acting in any capacity, by the President, or any department or officer of the United States, except in those instances in which power is given by the Constitution for those purposes; and, that among other essential rights, the liberty of conscience and of the press, cannot be cancelled, abridged, restrained or modified by any authority of the United States.

Here is an express and solemn declaration by the Convention of the State, that they ratified the Constitution in the sense, that

no right of any denomination can be cancelled, abridged, restrained or modified by the government of the United States or any part of it; except in those instances in which power is given by the Constitution; and in the sense particularly, "that among other essential rights, the liberty of conscience and freedom of the press cannot be cancelled, abridged, restrained or modified, by any authority of the United States."

Words could not well express, in a fuller or more forcible manner, the understanding of the Convention, that the liberty of conscience and the freedom of the press, were *equally* and *completely* exempted from all authority whatever of the United States.

Under an anxiety to guard more effectually these rights against every possible danger, the Convention, after ratifying the Constitution, proceeded a prefix to certain amendments proposed by them, a declaration of rights, in which are two articles providing, the one for the liberty of conscience, the other for the freedom of speech and of the press.

Similar recommendations having proceeded from a number of other States; and Congress, as has been seen, having in consequence thereof, and with a view to extend the ground of public confidence, proposed, among other declaratory and restrictive clauses, a clause expressly securing the liberty of conscience and of the press; and Virginia having concurred in the ratifications which made them a part of the Constitution; it will remain with a candid public to decide, whether it would not mark an inconsistency and degeneracy, if an indifference were now shown to a palpable violation of one of those rights, the freedom of the press; and to a precedent therein, which may be fatal to the other, the free exercise of religion.

That the precedent established by the violation of the former of these rights, may, as is affirmed by the resolution, be fatal to the latter, appears to be demonstrable, by a comparison of the grounds on which they respectively rest; and from the scope of reasoning, by which the power over the former has been vindicated.

First. Both of these rights, the liberty of conscience and of the press, rest equally on the original ground of not being delegated by the Constitution, and consequently withheld from the government. Any construction, therefore, that would attack this

original security for the one, must have the like effect on the other.

Secondly. They are both equally secured by the supplement to the Constitution; being both included in the same amendment, made at the same time, and by the same authority. Any construction or argument, then, which would turn the amendment into a grant or acknowledgment of power with respect to the press, might be equally applied to the freedom of religion.

Thirdly. If it be admitted that the extent of the freedom of the press, secured by the amendment, is to be measured by the common law on this subject, the same authority may be resorted to, for the standard which is to fix the extent of the "free exercise of religion." It cannot be necessary to say what this standard would be; whether the common law be taken solely as the unwritten, or as varied by the written law of England.

Fourthly. If the words and phrases in the amendment, are to be considered as chosen with a studied discrimination, which yields an argument for a power over the press, under the limitation that its freedom be not abridged; the same argument results from the same consideration, for a power over the exercise of religion, under the limitation that its freedom be not prohibited.

For, if Congress may regulate the freedom of the press provided they do not abridge it, because it is said only, "they shall not abridge it," and is not said, "they shall make no law respecting it:" the analogy of reasoning is conclusive, that Congress may *regulate* and even *abridge* the free exercise of religion; provided they do not *prohibit* it; because it is said only "they shall not prohibit it;" and is *not* said, "they shall make no law *respecting*, or no law *abridging* it."

The General Assembly were governed by the clearest reason, then, in considering the "Sedition Act," which legislates on the freedom of the press, as establishing a precedent that may be fatal to the liberty of conscience; and it will be the duty of all, in proportion as they value the security of the latter, to take the alarm at every encroachment on the former.

The two concluding resolutions only remain to be examined. They are in the words following:

That the good people of this Commonwealth, having ever felt and continuing to feel the most sincere affection for their brethren of the other States; the truest anxiety for establishing and perpetuating the Union of all; and the most scrupulous

fidelity to that Constitution, which is the pledge of mutual friendship, and the instrument of mutual happiness; the General Assembly doth solemnly appeal to the like dispositions in the other States, in confidence that they will concur with this Commonwealth in declaring, as it does hereby declare, that the acts aforesaid are unconstitutional; and, that the necessary and proper measures will be taken by each, for co-operating with this State, in maintaining unimpaired, the authorities, rights, and liberties reserved in the States respectively, or to the people.

That the Governor be desired, to transmit a copy of the foregoing resolutions to the Executive authority of each of the other States, with a request that the same may be communicated to the Legislature thereof; and that a copy be furnished to each of the Senators and Representatives, representing this State in the Congress of the United States.

The fairness and regularity of the course of proceeding, here pursued, have not protected it against objections even from sources too respectable to be disregarded.

It has been said, that it belongs to the judiciary of the United States, and not the State Legislatures, to declare the meaning of the Federal Constitution.

But a declaration, that proceedings of the Federal Government are not warranted by the Constitution, is a novelty neither among the citizens, nor among the Legislatures of the States; nor are the citizens or the Legislature of Virginia, singular in the example of it.

Nor can the declarations of either, whether affirming or denying the Constitutionality of measures of the Federal Government; or whether made before or after judicial decisions thereon, be deemed in any point of view, an assumption of the office of the judge. The declarations, in such cases, are expressions of opinion, unaccompanied with any other effect that what they may produce on opinion, by exciting reflection. The expositions of the judiciary, on the other hand, are carried into immediate effect by force. The former may lead to a change in the legislative expression of the general will; possibly to a change in the opinion of the judiciary; the latter enforces the general will, whilst that will and that opinion continue unchanged.

And if there be no impropriety in declaring the unconstitutionality of proceedings in the Federal Government, where can be the impropriety of communicating the declaration to other

States, and inviting their concurrence in a like declaration? What is allowable for one must be allowable for all; and a free communication among the States, where the Constitution imposes no restraint, is as allowable among the State Governments as among other public bodies or private citizens. This consideration derives a weight, that cannot be denied to it, from the relation of the State Legislatures to the Federal Legislature, as the immediate constituents of one of its branches.

The Legislatures of the States have a right also to originate amendments to the Constitution, by a concurrence of two thirds of the whole number, in applications to Congress for the purpose. When new States are to be formed by a junction of two or more States or parts of States, the Legislatures of the States concerned are, as well as Congress, to concur in the measure. The States have a right also to enter into agreements or compacts, with the consent of Congress. In all such cases a communication among them results from the object which is common to them.

It is lastly to be seen, whether the confidence expressed by the resolution, that the *necessary and proper measures* would be taken by the other States for co-operating with Virginia in maintaining the rights reserved to the States, or to the people, be in any degree liable to the objections which have been raised against it.

If it be liable to objection, it must be because either the object or the means are objectionable.

The object being to maintain what the Constitution has ordained, is in itself a laudable object.

The means are expressed in the terms "the necessary and proper measures." A proper object was to be pursued, by means both necessary and proper.

To find an objection, then, it must be shown that some meaning was annexed to these general terms, which was not proper; and, for this purpose, either that the means used by the General Assembly were an example of improper means, or that there were no proper means to which the terms could refer.

In the example given by the State, of declaring the Alien and Sedition Acts to be unconstitutional, and of communicating the declaration to the other States, no trace of improper means has appeared. And if the other States had concurred in making a like declaration, supported too by the numerous applications flowing immediately from the people, it can scarcely be doubted, that

these simple means would have been as sufficient, as they are unexceptionable.

It is no less certain that other means might have been employed, which are strictly within the limits of the Constitution. The Legislatures of the States might have made a direct representation to Congress, with a view to obtain a rescinding of the two offensive acts; or, they might have represented to their respective Senators in Congress, their wish, that two thirds thereof would propose an explanatory amendment to the Constitution; or two thirds of themselves, if such had been their option, might, by an application to Congress, have obtained a Convention for the same object.

These several means, though not equally eligible in themselves, nor probably, to the States, were all constitutionally open for consideration. And if the General Assembly, after declaring the two acts to be unconstitutional, the first and most obvious proceeding on the subject, did not undertake to point out to the other States, a choice among the farther measures that might become necessary and proper, the reserve will not be misconstrued by liberal minds into any culpable imputation.

These observations appear to form a satisfactory reply to every objection which is not founded on a misconception of the terms employed in the resolutions. There is one other, however, which may be of too much importance not to be added. It cannot be forgotten, that among the arguments addressed to those who apprehended danger to liberty from the establishment of the General Government over so great a country, the appeal was emphatically made to the intermediate existence of the State Governments, between the people and that Government, to the vigilance with which they would descry the first symptoms of usurpation, and to the promptitude with which they would sound the alarm to the public. This argument was probably not without its effect; and if it was a proper one then, to recommend the establishment of the Constitution, it must be a proper one now, to assist in its interpretation.

The only part of the two concluding resolutions that remains to be noticed, is the repetition in the first, of that warm affection to the Union and its members, and of that scrupulous fidelity to the Constitution, which have been invariably felt by the people of this State. As the proceedings were introduced with these sentiments, they could not be more properly closed than in the

same manner. Should there be any so far misled as to call in question the sincerity of these professions, whatever regret may be excited by the error, the General Assembly cannot descend into a discussion of it. Those, who have listened to the suggestion, can only be left to their own recollection of the part which this State has borne in the establishment of our National Independence, in the establishment of our National Constitution, and in maintaining under it the authority and laws of the Union, without a single exception of internal resistance or commotion. By recurring to these facts, they will be able to convince themselves, that the representatives of the people of Virginia, must be above the necessity of opposing any other shield to attacks on their national patriotism, than their own consciousness, and the justice of an enlightened public; who will perceive in the resolutions themselves, the strongest evidence of attachment both to the Constitution and to the Union, since it is only by maintaining the different governments and departments within their respective limits, that the blessings of either can be perpetuated.

The extensive view of the subject thus taken by the committee, has led them to report to the House, as the result of the whole, the following resolution:

Resolved, That the General Assembly, having carefully and respectfully attended to the proceedings of a number of the States, in answer to their resolutions of December 21, 1798, and having accurately and fully re-examined and re-considered the latter, find it to be their indispensable duty to adhere to the same, as founded in truth, as consonant with the Constitution, and as conducive to its preservation; and more especially to be their duty to renew, as they do hereby renew, their protest against "the Alien and Sedition Acts," as palpable and alarming infractions of the Constitution.

KENTUCKY LEGISLATURE

IN THE HOUSE OF REPRESENTATIVES.
November 10, 1798.

The House, according to the standing order of the day, resolved itself into a Committee of the whole, on the state of the Commonwealth,

Mr. CALDWELL in the chair.

And after some time spent therein, the Speaker resumed the chair, and Mr. Caldwell reported, that the Committee had, according to order, had under consideration the Governor's address, and had come to the following resolutions thereupon, which he delivered in the Clerk's table, where they were twice read and agreed to by the House.

1. *Resolved,* That the several States composing the United States of America, are not united on the principle of unlimited submission to their General Government; but that by compact under the style and title of a Constitution for the United States, and of amendments thereto, they constituted a General Government for special purposes, delegated to that Government certain definite powers, reserving each State to itself, the residuary mass of right to their own self-Government; and that whensoever the General Government assumes undelegated powers, its acts are unauthoritative, void, and of no force: That to this compact each State acceded as a State, and is an integral party, its Co-States forming as to itself, the other party: That the Government created by this compact was not made the exclusive or final *judge* of the extent of the powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but that as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions, as of the mode and measure of redress.

2. *Resolved,* That the Constitution of the United States having delegated to Congress a power to punish treason, counterfeiting the securities and current coin of the United States, piracies and felonies committed on the high seas, and offences against the laws of nations, and no other crimes whatever, and it being true as a general principle, and one of the amendments to the Constitution having also declared, "that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people;" therefore also the same act of Congress, passed on the 14th day of July, 1798, and entitled "an act, in addition to the act entitled an act, for the punishment of certain crimes against the United States;" as also the act passed by them on the 27th day of June, 1798, entitled "an act, to punish

frauds committed on the Bank of the United States," (and all other their acts which assume to create, define, or punish crimes other than those enumerated in the Constitution,) are altogether void and of no force, and that the power to create, define, and punish such other crimes is reserved, and of right, appertains solely and exclusively to the respective States, each within its own territory.

3. *Resolved*, That it is true as a general principle, and is also expressly declared by one of the amendments to the Constitution, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people;" and that no power over the freedom of religion, freedom of speech, or freedom of the press, being delegated to the United States by the Constitution, nor prohibited by it to the States, all lawful powers respecting the same did of right remain, and were reserved to the States, or to the people: That thus was manifested their determination to retain to themselves, the right of judging how far the licentiousness of speech and of the press, may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use, should be tolerated rather than the use be destroyed; and thus also, they guarded against all abridgment by the United States of the freedom of religious opinions and exercises, and retained to themselves the right of protecting the same, as this State by a law passed on the general demand of its citizens, had already protected them from all human restraint or interference: And that in addition to this general principle and express declaration, another and more special provision has been made by one of the amendments to the Constitution, which expressly declares, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press," thereby guarding in the same sentence, and under the same words, the freedom of religion, of speech, and of the press, insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehoods, and defamation, equally with heresy and false religion, therefore the act of the Congress of the United States, passed on the 14th day of July, 1798, entitled "an act, in addition to the act, for the punishment of certain crimes against the United States," which

does abridge the freedom of the press, is not law, but is altogether void and of no effect.

4. *Resolved*, That alien friends are under the jurisdiction and protection of the laws of the State wherein they are; that no power over them has been delegated to the United States, nor prohibited to the individual States distinct from their power over citizens; and it being true as a general principle, and one of the amendments to the Constitution having also declared, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people," the act of the Congress of the United States, passed on the 22d day of June, 1798, entitled "an act concerning aliens," which assumes power over alien friends not delegated by the Constitution, is not law, but is altogether void and of no force.

5. *Resolved*, That in addition to the general principle as well as the express declaration, that powers not delegated are reserved, another and more special provision inserted in the Constitution from abundant caution has declared, "that the *migration* or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808." That this Commonwealth does admit the migration of alien friends described as the subject of the said act concerning aliens; that a provision against prohibiting their migration, is a provision against all acts equivalent thereto, or it would be nugatory; that to remove them when migrated, is equivalent to a prohibition of their migration, and is therefore contrary to the said provision of the Constitution, and void.

6. *Resolved*, That the imprisonment of a person under the protection of the laws of this Commonwealth on his failure to obey the simple *order* of the President, to depart out of the United States, as is undertaken by the said act, entitled "an act concerning aliens," is contrary to the Constitution, one amendment to which has provided, that "no person shall be deprived of liberty without due process of law," and that another having provided, "that in all criminal prosecutions, the accused shall enjoy the right to a public trial by an impartial jury, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory

process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence," the same act undertaking to authorise the President to remove a person out of the United States who is under the protection of the law, on his own suspicion, without accusation, without jury, without public trial, without confrontation of the witnesses against him; without having witnesses in his favour, without defence, without counsel, is contrary to these provisions also of the Constitution, is therefore not law, but utterly void and of no force.

That transferring the power of judging any person who is under the protection of the laws, from the Courts to the President of the United States, as is undertaken by the same act, concerning aliens, is against the article of the Constitution, which provides, that "the judicial power of the United States, shall be vested in Courts, the Judges of which shall hold their offices during good behaviour," and that the said act is void for that reason also; and it is further to be noted, that this transfer of Judiciary power is to that magistrate of the General Government who already possesses all the Executive, and a qualified negative in all the Legislative powers.

7. *Resolved*, That the construction applied by the General Government, (as is evinced by sundry of their proceedings,) to those parts of the Constitution of the United States which delegates to Congress a power to lay and collect taxes, duties, imposts, and excises; to pay the debts, and provide for the common defence and general welfare of the United States, and to make all laws which shall be necessary and proper for carrying into execution the powers vested by the Constitution in the Government of the United States, or any department thereof, goes to the destruction of all the limits prescribed to their power by the Constitution — That words meant by that instrument to the subsidiary only to the execution of the limited powers, ought not to be so construed as themselves to give unlimited powers, nor a part so to be taken, as to destroy the whole residue of the instrument: That the proceedings of the General Government under colour of these articles, will be a fit and necessary subject for revisal and correction at a time of greater tranquillity, while those specified in the preceding resolutions call for immediate redress.

8. *Resolved*, That the preceding resolutions be transmitted to the Senators and Representatives in Congress from this Com-

monwealth, who are hereby enjoined to present the same to their respective Houses, and to use their best endeavours to procure at the next session of Congress, a repeal of the aforesaid unconstitutional and obnoxious acts.

9. *Resolved, lastly*, That the Governor of this Commonwealth be, and is hereby authorised and requested to communicate the preceding resolutions to the Legislatures of the several States, to assure them that this Commonwealth considers Union for specified National purposes, and particularly for those specified in their late Federal Compact, to be friendly to the peace, happiness, and prosperity of all the States: that faithful to that Compact, according to the plain intent and meaning in which it was understood and acceded to by the several parties, it is sincerely anxious for its preservation: that it does also believe, that to take from the States all the powers of self-Government, and transfer them to a general and consolidated Government, without regard to the special delegations and reservations solemnly agreed to in that Compact, is not for the peace, happiness, or prosperity of these States: And that therefore, this Commonwealth is determined, as it doubts not its Co-States are, tamely to submit to undelegated and consequently unlimited powers in no man or body of men on earth: that if the acts before specified should stand, these conclusions would flow from them: that the General Government may place any act they think proper on the list of crimes, and punish it themselves, whether enumerated or not enumerated by the Constitution as cognizable by them; that they may transfer its cognizance to the President or any other person, who may himself be the accuser, counsel, judge and jury, whose *suspicions* may be the evidence, his order the sentence, his officer, the executioner, and his breast the sole record of the transactions; that a very numerous and valuable description of the inhabitants of these States, being by this precedent reduced as outlaws to the absolute dominion of one man and the barrier of the Constitution thus swept away from us all, no rampart now remains against the passions and the power of a majority of Congress, to protect from a like exportation or other more grievous punishment the minority of the same body, the Legislatures, Judges, Governors and Counsellors of the States, nor their other peaceable inhabitants who may venture to re-claim the Constitutional rights and liberties of the States and people, or

who for other causes, good or bad, may be obnoxious to the views, or marked by the suspicions of the President, or be thought dangerous to his or their elections or other interests public or personal; that the friendless alien has indeed been selected as the safest subject of a first experiment; but the citizen will soon follow, or rather has already followed; for, already has a Sedition Act marked him as its prey: that these and successive acts of the same character, unless arrested on the threshold, may tend to drive these States into revolution and blood, and will furnish new calumnies against Republican Governments, and new pretexts for those who wish it to be believed, that man cannot be governed but by a rod of iron: that it would be a dangerous delusion, were a confidence in the men of our choice, to silence our fears for the safety of our rights: that confidence is every where the parent of despotism: free government is founded in jealousy and not in confidence; it is jealousy and not confidence which prescribes limited Constitutions to bind down those whom we are obliged to trust with power: that our Constitution has accordingly fixed the limits to which and no further our confidence may go; and let the honest advocate of confidence read the Alien and Sedition Acts, and say if the Constitution has not been wise in fixing limits to the Government it created, and whether we should be wise in destroying those limits? Let him say what the Government is if it be not a tyranny, which the men of our choice have conferred on the President, and the President of our choice has assented to and accepted over the friendly strangers, to whom the mild spirit of our country and its laws had pledged hospitality and protection: that the men of our choice have more respected the bare suspicions of the President, than the solid rights of innocence, the claims of justification, the sacred force of truth, and the forms and substance of law and justice. In questions of power, then let no more be heard of confidence in man, but bind him down from mischief, by the chains of the Constitution. That this Commonwealth does therefore call on its Co-States for an expression of their sentiments on the acts concerning aliens, and for the punishment of certain crimes herein-before specified, plainly declaring whether these acts are or are not authorised by the Federal Compact? And if doubts not that their sense will be so announced, as to prove their attachment unaltered to limited government, whether general or particular, and that the rights and liberties of their Co-States, will be

exposed to no dangers by remaining embarked on a common bottom with their own: That they will concur with this Commonwealth in considering the said acts as so palpably against the Constitution, as to amount to an undisguised declaration, that the Compact is not meant to be the measue of the powers of the General Government, but that it will proceed in the exercise over these States of all powers whatsoever: That they will view this as seizing the rights of the States, and consolidating them in the hands of the General Government with a power assumed to bind the States, (not merely in cases made Federal,) but in all cases whatsoever, by laws made, not with their consent, but by others against their consent; That this would be to surrender the form of Government we have chosen, and to live under one deriving its powers from its own will, and not from our authority; and that the Co-States recurring to their natural right in cases not made Federal, will concur in declaring these acts void and of no force, and will each unite with this Commonwealth in requesting their repeal at the next session of Congress.

EDMUND BULLOCK, *S. H. R.*
JOHN CAMPBELL, *S. S. P. T.*

Passed the House of Representatives, Nov. 10th, 1798.
Attest,

THOMAS TODD, *C. H. R.*

IN SENATE, November 13th, 1798, unanimously concurred in.
Attest,

B. THRUSTON, *Clk. Sen.*

Approved Nov. 16th, 1798.

JAMES GARRARD, *G. K.*

By the Governor.

HARRY TOULMIN,
Secretary of State.